TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 146

UNITED STATES OF AMERICA, PETITIONER,

vs.

HOWARD A. McNINCH, D/B/A THE HOME COMFORT COMPANY, ROSALIE McNINCH AND GARIS P. ZEIGLER; FREDERICK L. TOEPLEMAN; AND CATO BROS., INC., WILFRED R. CATO, WILLIAM R. CATO, AND MAGIE L. DUNN (NEE: MAGIE L. STONE)

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 28, 1957

CERTIORARI GRANTED OCTOBER 14, 1957

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 146

UNITED STATES OF AMERICA, PETITIONER,

VS.

HOWARD A. McNINCH, D/B/A THE HOME COMFORT COMPANY, ROSALIE McNINCH AND GARIS P. ZEIGLER; FREDERICK L. TOEPLEMAN; AND CATO BROS., INC., WILFRED R. CATO, WILLIAM R. CATO, AND MAGIE L. DUNN (NEE: MAGIE L. STONE)

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7224

UNITED STATES OF AMERICA, Appellant,

Versus

HOWARD A. McNINCH, d/b/a THE HOME COMFORT COMPANY, ROSALIE McNINCH AND GARIS P. ZEIGLER, Appellees

APPENDIX TO APPELLANTS' BRIEF—Filed September 10, 1956

[fol. 3] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

STATEMENT OF RELEVANT DOCKET ENTRIES

1. Summons and Complaint, filed April 14, 1955.
2. Answer of the defendant, Garis P. Zeigler, with demand for jury trial, filed May 18, 1955.
3. Notice of Motion to Dismiss Action as to Howard A. and Rosalie McNinch, filed June 2, 1955.
4. Notice of Motion to Dismiss Action as to the Defendant, Garis P. Zeigler, filed June 4, 1955.
5. Order Granting Defendant's Motion to Dismiss Action, filed February 15, 1956.
6. Notice of Appeal on behalf of the United States, filed April 13, 1956.
7. Letter from N. Welch Morrisette, Esq. in reference to appeal record, filed April 21, 1956.
8. Appeal Record to USCA on May 7, 1956, 5 pages at 40 cents per page, $2.00.

IN UNITED STATES DISTRICT COURT

COMPLAINT—Filed April 14, 1955

1. This is a civil action brought by the United States of America as plaintiff under the provisions of Sections 3490,

3492 and 5438 of the Revised Statutes (31 U. S. C. 231, 233) of which this Court has jurisdiction by virtue of the provisions of Section 3491 of the Revised Statutes (31 U. S. C. 232), as amended.

2. The defendant, Howard A. McNinch, was at all times hereinafter mentioned doing business as an individual under the name of The Home Comfort Company in the Eastern District of South Carolina, and presently resides at 208 Academy Way, Columbia, S. C., which address is within the jurisdiction of this Court.

[fol. 4] 3. The defendant, Rosalie McNinch, was at all times hereinafter mentioned employed by The Home Comfort Company as a secretary, and presently resides at 208 Academy Way, Columbia, S. C., which address is within the jurisdiction of this Court.

4. The defendant, Garis P. Zeigler, was at all times hereinafter mentioned employed by The Home Comfort Company as a salesman, and presently resides at 130 Brooklyn Circle, Columbia, S. C., which address is within the jurisdiction of this Court.

5. None of the defendants is, nor at any time mentioned herein was, a member of the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States.

6. At all times hereinafter stated the South Carolina National Bank, with offices in Columbia, S. C., was a financial institution which had qualified and been approved by the Federal Housing Administration, an agency of the United States, under Title I of the National Housing Act, as amended, and the regulations promulgated pursuant thereto, for insurance against losses sustained as the result of loans or advances of credit made for the purpose of financing home alterations, repairs and improvements.

7. The defendants at various times during the period from on or about November 6, 1951 to on or about January 10, 1953, in violation of the provisions of Sections 3490 and 5438 of the Revised Statutes, submitted to the South Carolina National Bank false, fictitious or fraudulent applications or claims, entitled "FHA Title I Credit Application (Property Improvement Loan)", for the purpose of obtaining or aiding to obtain for various homeowners with whom they had contracted to make altera-

tions, repairs or improvements, the payment or approval of loans or advances of credit with the intent that the said [fol. 5] applications or claims should be reported to and accepted by the Federal Housing Administration for insurance, which were known by the defendants to be false, fictitious or fraudulent in that they represented the applicants financial position to be favorable, whereas in fact their said status was not favorable.

8. In support of the representations contained in the said applications the defendants also submitted to the South Carolina National Bank credit reports, purportedly those of the Associated Credit Bureaus of America entitled "FHA Modernization Report ACB of A No. 10" which were false, fictitious or fraudulent and known by the defendants to be false, fictitious or fraudulent in that they likewise indicated the applicants financial position to be favorable whereas in fact their said status was unfavorable.

9. The South Carolina National Bank in reliance upon the said applications and credit reports approved the requested loans which were reported to, and accepted by, the Federal Housing Administration for insurance. The proceeds thereof were deposited to the account of The Home Comfort Company in the South Carolina National Bank. Schedule "A" attached hereto and incorporated herein by reference, reflects the names of the loan applicants in the cases in which the aforesaid false, fictitious or fraudulent claims as specified in paragraphs 7 and 8 of this complaint were filed. Said Schedule also reflects the property location, amount of credit requested, date of application, and date loans were reported to the Federal Housing Administration for insurance.

10. Defendants at various times during the period from on or about November 6, 1951, to on or about January 10, 1953, in violation of the provisions of Sections 3490 and 5438 of the Revised Statutes, agreed, combined, and con- [fol. 6] spired with each other and with divers other persons to defraud the United States, or an agency or officer thereof, by obtaining or aiding to obtain the payment or approval of false, fictitious or fraudulent claims for loans or advances of credit insured by the Federal Housing Administration.

11. Among the tricks, schemes, and devices employed by the defendants, without the knowledge of the plaintiff, in furtherance of the matters set forth in paragraphs 7, 8, 9 and 10 are:

(a) The improper procurement and use of approximately fifty blank credit report forms from the Merchants' Credit Bureau, Hartsville, South Carolina, bearing the caption "FHA Modernization Report ACB of A No. 10", and

(b) The obtainment and use of approximately two thousand counterfeit credit report forms from the Vogue Press, Columbia, S. C., bearing the captions "Associated Credit Bureaus of America," and "FHA Modernization Report ACB of A No. 10".

12. By reason of the premises and pursuant to the provisions of Sections 3490 and 5438 of the Revised Statutes, each defendant became and is liable to forfeit and pay to the United States the sum of $2,000 for each and every false claim referred to in paragraphs 7 and 9 hereof and reflected in Schedule "A" attached, and the sum of $2,000 for each of the other acts and transactions done or committed by them which constitute violations of said Statutes, together with interest and costs of this suit.

Wherefore, the United States, as the plaintiff, demands judgment against each of the defendants for the sum of $2,000 for each and every one of the foregoing false, fictitious or fraudulent claims made or caused to be made, presented or caused to be presented by defendants upon the [fol. 7] United States for payment or approval, and for each of the other acts done or committed by the defendants which constitute a violation of Sections 3490 and 5438 of the Revised Statutes, together with interest and costs of this action.

United States Attorney.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed May 18, 1955

The defendant Garis P. Zeigler, answering the complaint herein would respectfully show:

1. The complaint fails to state a claim against the defendant upon which relief can be granted.

2. Answering paragraph 1 this defendant admits that the action is brought under the statutes therein designated, but denies that plaintiff is entitled to any relief thereunder.

3. The allegations of paragraphs 2, 3, 4, 5, and 6 of the complaint are admitted.

4. The allegations of paragraphs 7, 8, 9, 10, 11, and 12 are denied, and except as herein specifically admitted this defendant denies each and every allegation in said complaint contained.

Wherefore, having fully answered the defendant Garis P. Zeigler prays that the complaint be dismissed with costs, and for such other and further relief as may be just and proper.

Nelson, Mullins & Grier, (S.) P. H. Nelson, Attorneys for Defendant Garis P. Zeigler. Address: 902 Palmetto Building, Columbia, S. C.

Columbia, S. C., May 5, 1955.

Jury trial demanded.

[fol. 8] IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION—Filed June 2, 1955

To Honorable N. Welch Morrisette, Jr., United States Attorney.

Please take notice that on the fifth day after service hereof, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, before the Honorable George Bell Timmerman, United States District Judge, at chambers, United States Courthouse, Columbia, South Carolina, the undersigned attorney for the defendants, Howard A.

McNinch, d/b/a The Home Comfort Company and Rosali McNinch, will apply for an Order dismissing this action because the Complaint fails to state a claim against either of the said defendants upon which relief can be granted.

(S). A. Fletcher Spigner, Jr., Attorney for the Defendants Howard A. McNinch, d/b/a The Home Comfort Company and Rosalie McNinch.

Columbia, S. C., May 26, 1955.

IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION—Filed June 4, 1955

To Honorable N. Welch Morrisette, Jr., United States Attorney:

You will please take notice that on the fifth day after service hereof, at ten o'clock a. m., or as soon thereafter as counsel may be heard, the defendant, Garis P. Zeigler, through his undersigned attorney, will move before the Honorable George Bell Timmerman, United States District Judge, at his Chambers at the Federal Court House in Columbia, South Carolina, for an Order dismissing this action on the ground that the Complaint fails to state a [fol. 9] claim against said defendant upon which relief can be granted.

P. H. Nelson, Attorney for the defendant, Garis P. Zeigler. Address: 902 Palmetto Building, Columbia, S. C.

Columbia, S. C., June 3, 1955.

IN UNITED STATES DISTRICT COURT

ORDER—February 15, 1956

I have for consideration defendants' motions to dismiss this action. The motion of Howard A. McNinch and Rosalie McNinch and the motion of Garis P. Zeigler are both made upon the same ground, that the complaint fails to

state a claim against the defendants for which relief can be granted.

The complaint alleges substantially the following facts: The defendant Howard A. McNinch operated a business known as The Home Comfort Company which had for its purpose the alteration, repair and improvement of homes. The defendant Rosalie McNinch was secretary of the business, and the defendant Garis P. Zeigler was employed as a salesman. At various times during the period from November, 1951, through January, 1953, the defendants submitted to the South Carolina National Bank, an institution approved by the Federal Housing Administration for insurance against losses sustained from the lending of money for home improvements, fraudulent FHA loan applications and credit reports pertaining to the financial condition of customers of The Home Comfort Company, and conspired thereby among themselves and their customers to defraud the United States by obtaining the approval of false and fictitious applications for loans insured by the Federal Housing Administration.

[fol. 10] This action is brought under Sections 231 and 233 of Title 31, United States Code. The pertinent part of Section 231 reads as follows:

> "Any person * * * who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, * * * shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the

amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

It seems to me that the quoted part of Section 231 states three general categories under one or more of which an action must fall before it can be sustained thereunder. To come within the first category, it must appear from the complaint that the defendants made or caused to be made, or presented or cause to be presented, to a person or officer in the service of the United States a claim against the [fol. 11] United States or some department thereof knowing such claim to be false, fictitious, or fraudulent. There is no allegation in the instant complaint that any such claim, false or otherwise, was ever made or presented to any department or officer of the United States by the defendants or anyone else.

To meet the conditions of the second category, it should be alleged in the complaint that the defendants, for the purpose of obtaining or aiding in obtaining the payment or approval of *such a claim*, made, used or caused to be made or used, a false bill, receipt, claim or other designated paper, knowing the same to be false or fictitious in some respect or respects. The instant complaint does not allege the existence of "such a claim," that is, "any claim upon or against the Government of the United States, or any department or officer thereof," for it is not contended that any such claim has ever been made or presented to or paid by the plaintiff or any department or officer of plaintiff.

To come within the third category, the complaint should allege that defendants entered into an agreement or conspiracy to defraud the United States or some department or officer thereof by obtaining or aiding in obtaining payment or allowance of a false or fraudulent claim. There is no contention in this case that the Government or any department or officer thereof has allowed, approved, or paid any "such claim."

The gist of the Government's contention in this case, as stated in its brief, is "that when a person presents a *credit application* known to be false to an FHA-approved

lending institution for the purpose of obtaining a loan, as intended by the applicant, and the loan is insured by the FHA, the *False Claims Act* is violated even though *there* [fol. 12] *there is no default* in the loan." [Emphasis Added.]

It may be that the statute should provide a penalty for what is here complained about, but it is quite obvious that it does not do so, maybe cause when the Act was enacted in 1863, the Congress did not think in terms of the situation with which we are now concerned in 1956.

It seems evident that, if the statute is made to apply here, it will be after the Court has effected some very drastic amendments to the Act (a procedure not now novel in some courts), such as holding that *a credit application* directed to a bank is the same as a "claim upon or against the Government of the United States, or any department or officer thereof," the bank, of course, being regarded as the Government or a department thereof. I do not feel that I have the authority or competency to exercise such legislative power since by the Constitution all legislative power has been vested in the Congress of the United States.

In point here is the case of *United States* v. *Martin Tieger*, in the United States District Court for the District of New Jersey. The opinion by Judge Smith was filed November 18, 1954, but was never published. The facts there are on all fours with those here, except for names, dates, amounts, etc. Even, as here, the loans were all paid and no one suffered a loss. There as here it was argued, "that the *presentation of the false and fraudulent loan applications was tantamount to the presentation of claims upon or against the Government of the United States or an agency thereof.*" [Emphasis added.] Commenting on this argument, Judge Smith said: "We are of the opinion that the argument is without merit. The term 'claim,' in its common acceptance, denotes a demand for money or [fols. 13-22] property as of right. Accord, *Hobbs* v. *McLean*, 117 U.S. 567, 575; *Milliken* v. *Barrow*, 65 Fed. 888, 894; *United States* v. *Byron*, 223 Fed. 789, 800. There is no allegation that any such demands were ever made upon the United States or any agency thereof; in fact, the repayment of the loans preclude any such demands." I find

myself in accord with the views expressed by Judge Smith in the cited *Tieger* case.

It appearing to me that the complaint fails to state a claim for which relief can be granted, defendants' motions to dismiss the action should be granted. Accordingly, it is so.

Ordered.

This 15th day of February, 1956.

(S.) George Bell Timmerman, United States District Judge.

[fol. 23] IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7224

UNITED STATES OF AMERICA, Appellant,

versus

HOWARD A. McNINCH, d/b/a THE HOME COMFORT COMPANY, ROSALIE McNINCH and GARIS P. ZEIGLER, Appellees

Appeal from the United States District Court for the Eastern District of South Carolina, at Columbia

DOCKET ENTRIES

May 8, 1956, record on appeal filed and appeal docketed.

May 8, 1956, appearance of Melvin Richter and William W. Ross, Attorneys, Department of Justice, entered for the appellant.

May 11, 1956, appearance of N. Welch Morrisette, Jr., United States Attorney, entered for the appellant.

May 11, 1956, appearance of Edwin P. Gardner entered for the appellees.

August 22, 1956, appearance of P. H. Nelson and E. W. Mullins entered for the appellees.

September 10, 1956, brief and appendix for appellant filed.

September 26, 1956, brief and appendix for appellees filed.

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—October 4, 1956 (Omitted in printing)

[fol. 24] IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ORDER DEFERRING DECISION UNTIL FINAL ACTION OF THE SUPREME COURT IN UNITED STATES v. MARTIN TIEGER AND UNITED STATES v. HARVEY COCHRAN—Filed and Entered October 11, 1956

In the above entitled case it appearing that the questions involved have been presented to the Supreme Court of the United States in petitions for certiorari to review the case of United States v. Martin Tieger, 3 Cir. 234 F. 2d 589, and United States v. Harvey Cochran, 5 Cir. 235 F. 2d 131:

It is ordered that the decision in this case be deferred until the Supreme Court has acted upon said petitions for certiorari; and if certiorari is granted, until the decision of the Supreme Court in these cases.

John J. Parker, Chief Judge, Fourth Circuit.

[fol. 25] IN UNITED STATES COURT OF APPEALS FOR THE Fourth Circuit

No. 7224

UNITED STATES OF AMERICA, Appellant,

versus

HOWARD A. McNINCH, d/b/a THE HOME COMFORT COMPANY, ROSALIE McNINCH and GARIS P. ZEIGLER, Appellees

Appeal from the United States District Court for the Eastern District of South Carolina, at Columbia

Argued October 4, 1956

No. 7321

FREDERICK L. TOEPLEMAN, Appellant and Cross-Appellee,

versus

UNITED STATES OF AMERICA, Appellee and Cross-Appellant

[fol. 26] Cross-Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh

No. 7333

CATO BROS., INCORPORATED, WILFRED R. CATO, WILLIAM R. CATO, and Magie L. Dunn (nee: Magie L. Stone), Appellants,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond

Argued January 14, 1957

Before PARKER, Chief Judge, SOPER, Circuit Judge, and BRYAN, *District Judge*

No. 7224. William W. Ross, Attorney, Department of Justice, (George Cochran Doub, Assistant Attorney Gen-

eral; N. Welch Morrisette, Jr., United States Attorney, and Melvin Richter, Attorney, Department of Justice, on brief) for Appellant, and E. W. Mullins and Edwin P. [fol. 27] Gardner (Nelson, Mullins & Grier on brief) for Appellees.

No. 7321. B. S. Royster, Jr., (Frank W. Hancock, Jr., on brief) for Appellant and Cross-Appellee, and William W. Ross, Attorney, Department of Justice, (George Cochran Doub, Assistant Attorney, General; Julian T. Gaskill, United States Attorney, and Melvin Richter, Attorney, Department of Justice, on brief) for Appellee and Cross-Appellant.

No. 7333. Charles W. Laughlin and A. C. Epps (Christian, Barton, Parker & Boyd on brief) for Appellants, and William W. Ross, Attorney, Department of Justice, (George Cochran Doub, Assistant Attorney General; Lester S. Parsons, Jr., United States Attorney, and Melvin Richter, Attorney, Department of Justice, on brief) for Appellee.

OPINION—Decided February 28, 1957

PARKER, Chief Judge:

These are appeals from judgments in actions instituted under the Federal False Claims Act, R.S. 3490, 5438, 31 USC 231. In No. 7224 the action was grounded on false representations made in obtaining the guaranty by the Federal Housing Administration of loans made to defendants by a bank. Judgment was entered for defendants and the United States has appealed. See *United States* v. *McNinch* 138 F. Supp. 711. In the other two cases, action was grounded on false representations made to the Commodity Credit Corporation for the purpose of obtaining loans on cotton. Judgment was entered in favor of the United States for the $2,0000 forfeiture provided by statute as to [fol. 28] a number of transactions and the defendants have appealed. The cases are considered together, as the controlling question in all of them is the applicability of the False Claims Act to claims against government corporations as distinguished from claims against the government itself or "any department or officer thereof."

In No. 7224 the facts are that two of the defendants were officers and one a salesman of an unincorporated home construction business. They presented to a bank, which was an approved FHA lending institution, eleven fraudulent FHA loan applications for the purpose of obtaining FHA-insured home improvement loans in behalf of home-owner customers with whom they had contracted to carry out home improvements. The bank made the loans, which were then insured by the FHA pursuant to Title I of the National Housing Act. Prior to the institution of this proceeding, two of the defendants pleaded guilty to violating 18 USC 1010, which prohibits the making of false statements for the purpose of obtaining FHA-insured loans.

In No. 7321 the facts are that defendants were engaged in the cotton business. Desiring to obtain non-recourse loans on cotton which they purchased in the course of their business, they caused eighty-two producers' notes and loan agreements to be signed by producers of cotton and used them to obtain loans under the Cotton Loan Program from the Commodity Credit Corporation, pledging as security cotton belonging, not to the producers who signed the notes, but to the defendants. The holding of the court was that each note constituted a false claim under the statute and judgment was entered against the defendant Toepleman for the sum of $2,000 as to each note, or a total of $164,000, subject to a credit of $2,000. Defendant Toepelman paid [fol. 29] 39 of the notes and redeemed the cotton thereunder. The remaining 43 notes were not paid on maturity and the cotton pledged to secure same was sold by the government at a loss of $6,733.97. Toepleman appealed from the judgment for $162,000 and the United States filed a cross appeal from the refusal of the judge to render judgment for double the amount of the $6,733.97 loss sustained on the sale of the cotton.

In No. 7333, the facts are that the defendants obtained loans on cotton from the Commodity Credit Corporation in 30 separate transactions embracing notes which contained the false representation that they were made by the producers of the cotton. Judgment was rendered against the defendants for $60,000, representing a forfeiture of $2,000 as to each transaction; and from this portion of the judgment defendants have appealed. Judgment was ren-

dered in favor of defendants for $1,150.24 on a counter-claim relating to an entirely different matter, and from this portion of the judgment no appeal was taken.

The important question presented by all of the appeals is whether the forfeiture of $2,000 imposed by the False Claims Act applies where the claims are made, not directly against the government or against "any department or officer" of the government, but against a corporation as a governmental agency. We think that, in the light of the language used in the statute, as well as in the light of legislative history, this question must be answered in the negative.

The authoritative text of the False Claims Act is to be found in Section 3490 of the Revised Statutes of 1878, which is as follows:

> [fol. 30] "Sec. 3490—Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the services of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title 'Crimes', shall forfeit and pay to the United States the sum of Two Thousand Dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

This section has never been amended, although R.S. 5438 has been amended. Prior to the amendment of R.S. 5438, the pertinent portion of that section, incorporated by reference in R.S. 3490, was as follows:

> "Sec. 5438—Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval services of the United States, any claim *upon or against the Government of the United States, or any department or officer thereof*, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of *such claim*, makes, uses or causes to be made or used, any false bill, receipt,

voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the *Government of the United States or any department or officer thereof, by obtaining or aiding to obtain the* [fol. 31] *payment or allowance of any false or fraudulent claim,* * * * shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars." (Italics supplied).

In 1918, section 5438, then appearing as section 35 of the Criminal Code, was amended by adding to the list of those to whom it was made criminal to present a false claim "any corporation in which the United States of America is a stockholder". Like language was added to the description of the claim. 40 Stat. 1015. The purpose of the amendment was to extend the criminal provision of the section so as to protect government corporations, i.e. corporation in which the government was a stockholder and in reality the owner of the corporate business and property. See *United States* v. *Bowman* 260 U.S. 94 and H.R. Report No. 668, 65th Cong. 2d Sess. and 56 Cong. Rec. pp. 11, 118-11, 119. The section as amended was carried forward and reenacted as section 287 of Title 18 of the United States Code, making it a crime to present a false claim against "The United States, or any department or *agency* thereof." (Italics supplied). This language, of course, makes the criminal statute applicable to false claims against government corporations, since "agency" is defined in 18 USC 6 as including "any corporation in which the United States has a proprietary interest."

There has been no amendment of the civil provisions contained in R.S. 3490, extending their coverage to false claims against government corporation; and it is well settled that the incorporation of the terms of a statute by reference does not incorporate subsequent amendments of that statute. See *Kendall* v. *United States* 12 Peters 524, [fol. 32] 625; *In re Heath* 144 U.S. 92; *Hassett* v. *Welch* 303 U.S. 303, 314. This has been held expressly with respect to the incorporation by R.S. 3490 of the provisions of R.S. 5438. *United States ex rel. Kessler* v. *Mercur Corporation* 2 Cir. 83 F. 2d 178, 180, cert. den. 299 U.S. 576.

In the case cited, the Court of Appeals of the Second Circuit, speaking through Judge Augustus N. Hand, said:

> "While section 5438 was amended, repealed, and finally since the time when it was referred to in section 3490 superseded by a broader enactment (18 USCA 80), it stands, so far as section 3490 is concerned, as it was written when incorporated by reference. It is quite immaterial that the superseding act alone appears in the United States Code, for the Code only embodies a prima facie statement of the statutory law. It is well settled that where a statute incorporates another, and the one incorporated is thereafter amended or repealed, the scope of the incorporating statute remains intact and 'no subsequent legislation has ever been supposed to affect it.' Kendall v. United States, 12 Pet. 524, 625, 9 L. Ed. 1181; In re Heath, 144 U.S. 92, 93, 94, 12 S. Ct. 615, 36 L. Ed. 358."

See also *United States* v. *McMurty* (W.D.Ky.) 5 F. Supp. 515, and *Olson* v. *Mellon* (W.D.Pa.) 4 F. Supp. 947, adopted as opinion of Court of Appeals of Third Circuit 71 F. 2d 1021.

The question, then, is narrowed to this: Is a claim against a government corporation, which acts as an agency of the government, a claim against the government of the United States or a department or officer thereof as required by R.S. 5438 as a condition of liability at the time of the adoption [fol. 33] of R.S. 3490? The answer is manifestly that it is not such a claim. A government corporation, even though acting as an agency of the government is not the government, nor is it a department or officer of the government. As said by Judge Patterson in *United States ex rel. Meyer Salzman* v. *Salant & Salant* 41 F. Supp. 196, 197: "a corporation which is an agency of the government is not the government or a department or officer of it". See also *Pierce* v. *United States* 314 U.S. 306 and *Lindgren* v. *United States Shipping Board Merchant Fleet Corporation* 55 F. 2d 117, 120, cert. den. 286 U.S. 542. In the case last cited this court said:

> "Plaintiff contends, however, that this suit and the former suit are virtually against the same defendant because the United States owns the stock of the Fleet Corporation and the Fleet Corporation is an agency

of the United States. This position cannot be sustained. The United States is a sovereign power representing in its corporate capacity the people of the country and immune from suit, except as it may give its consent thereto. The Fleet Corporation is a private corporation of the District of Columbia, created under the laws of the United States, with power to sue and be sued in the same manner as other corporations. Sloan Shipyards Corp. v. U. S. Shipping Board Emergency Fleet Corporation, 258 U.S. 549, 568, 42 S. St. 386, 66 L. Ed. 762; U. S. Shipping Board Merchant Fleet Corporation v. Harwood, 281 U.S. 519, 526, 50 S. Ct. 372, 74 L. Ed. 1011. Although the United States owns its stock, it is a distinct entity just as other corporations are distinct from their stockholders. A suit against it is not a suit against the United States, and a suit against the United States is not a suit against it."

[fol. 34] There is nothing to the contrary in *United States ex rel. Marcus* v. *Hess* 317 U.S. 537. The fraud there was perpetrated not against a government corporation but against the government itself, the decision being that R.S. 5438 covered the case of one who knowingly caused the government to pay claims grounded in fraud. The gist of the decision is contained in the following quotation, viz.:

"While payment itself, in the sense of the direct transferring of checks, was done in the name of local authorities, monthly estimates for payment were submitted by the respondents to the local sponsors on P.W.A. forms which showed the government's participation in the work and called attention to other federal statutes prohibiting fraudulent claims. It was a prerequisite to respondents' payment by the local sponsors that these estimates be filed, transmitted to, and approved by, the P.W.A. authorities. *Payment was then made from a joint construction bank account containing both federal and local funds.* The work was done under constant federal supervision.

"*The government's money* would never have been placed in the joint fund for payment to respondents had its agents known the bids were collusive. By their conduct, the respondents thus caused *the government to pay* claims of the local sponsors in order that they

> might in turn pay respondents under contracts found to have been executed as the result of the fradulent bidding. This fraud did not spend itself with the execution of the contract. Its taint entered into every swollen estimate which was the basic cause for payment of every dollar paid by the P.W.A. into the joint fund for the benefit of respondents. The initial fraud- [fol. 35] ulent action and every step thereafter taken pressed ever to the ultimate goal—payment of government money to persons who had caused it to be defrauded." (Italics supplied).

The fact that the government corporations here involved were not in existence at the time of the enactment of R.S. 5438 would not be controlling if the language of the section were broad enough to encompass claims against such corporations; but, as we have seen, the language is not broad enough to cover such claims, however liberal an interpretation be placed upon it. And in this connection we are bound to give consideration to the fact that the language of R.S. 3490 was not amended to cover such claims when amendments were made in the language of R.S. 5438 to cover the making of fraudulent claims against government corporations. Not only is this true, but it is true also that, in subsequent legislation passed to protect government corporations against false and fraudulent claims, criminal penalties were specifically provided but no provision was made for civil penalties or forfeitures. See 18 USC 1010 and 1014. If it were the intent of Congress that presentation of false claims against such corporations be redressed by actions for civil penalties or forfeitures, it would have been easy enough to have so provided when the statutes were enacted providing the criminal penalties.* Such action by Congress would certainly be more logical

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* In such case, civil penalties would properly have been made recoverable by the corporation, not by the United States. The fact that the forfeiture under R.S. 3490 must be recovered in a suit by the United States, and not by the government corporation to which the false claim has been presented, is an additional argument that false claims against such corporations are not comprehended by the statute.

and seemly than for the courts to give a forced interpreta-
[fol. 36] tion to a statute passed three quarters of a century ago when government corporations had not been dreamed of.

Another ground for holding the statute not applicable in case No. 7224 is that the obtaining of the guaranty of loan was not the making of a claim within the meaning of the statute. *United States* v. *Tieger* 3 Cir. 234 F 2d 589, cert. den. 352 U.S. 941; *United States* v. *Cochran* 5 Cir. 275 F. 2d 131, cert. den. 352 U.S. 941.

For the reasons stated, the decision in No. 7224 will be affirmed, the decision in No. 732 will be reversed in so far as it gives judgment against defendants and affirmed in so far as it denies recovery of damages under the statute, and the decision in No. 7333 will be reversed in so far as it gives judgment against defendants.

No. 7224, Affirmed.

No. 7321, Reversed in Part and Affirmed in Part.

No. 7333, Reversed in Part.

[fol. 37] IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7224.

UNITED STATES OF AMERICA, Appellant,

vs.

HOWARD A. MCNINCH, d/b/a THE HOME COMFORT COMPANY, ROSALIE MCNINCH and GARIS P. ZEIGLER, Appellees.

Appeal from the United States District Court for the Eastern District of South Carolina

JUDGEMENT—Filed and Entered February 28, 1957.

This cause came on to be heard on the record from the United States District Court for the Eastern District of South Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

John J. Parker, Chief Judge, Fourth Circuit.
Morris A. Soper, United States Circuit Judge.
Albert V. Bryan, United States District Judge.

April 2, 1957, mandate issued and transmitted to the Clerk of the United States District Court at Charleston, South Carolina.

April 2, 1957, record on appeal returned to Clerk of the United States District Court at Charleston, South Carolina.

[fol. 38] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 39] IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7321

FREDRICK L. TOEPLEMAN, Appellant,

versus

UNITED STATES OF AMERICA, Appellee,

and

UNITED STATES OF AMERICA, Appellant,

versus

FREDERICK L. TOEPLEMAN and GARLAND GREENWAY, Appellees

Appendix to Brief of Frederick L. Toepleman, Appellant —Filed January 2, 1957

[fol. 40] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, RALEIGH DIVISION

CIVIL NO. 822

UNITED STATES OF AMERICA, Plaintiff,

vs.

FREDERICK L. TOEPLEMAN, AND GARLAND GREENWAY, as Individuals; Frederick L. Toepleman and Garland Greenway Partners, d-b-a Garland Greenway; Walter B. Moseley; A. E. Henderson; First Citizens Bank and Trust Company, Louisburg, North Carolina, Defendants.

COMPLAINT

1. This is a civil action brought by the United States of America as plaintiff under the provisions of Section 3490

through 3492, and Section 5438 of the Revised Statutes (31 U.S.C. 231-233) of which this Court has jurisdiction under Section 3491 of the Revised Statutes, as amended (31 U.S.C. 232).

2. The defendants, Frederick L. Toepleman and Garland Greenway, are residents of Henderson, Vance County, North Carolina, within the jurisdiction of this Court.

3. The defendants, Frederick L. Toepleman and Garland Greenway, do business as partners under the partnership name of Garland Greenway at Henderson, Vance County, North Carolina within the jurisdiction of this Court.

4. The defendant, Walter B. Moseley, is a resident of Broadnax, Virgina.

[fol. 41] 5. The defendant, A. E. Henderson, is a resident of Louisburg, Franklin County, North Carolina, within the jurisdiction of this Court, and was at all times mentioned herein Cashier of the First Citizens Bank and Trust Company, Louisburg, North Carolina, authorized to process loans to cotton producers by the said bank under the 1948 Cotton Loan Program.

6. The defendant, First Citizens Bank and Trust Company, Louisburg, North Carolina, is a state banking association, duly organized and existing according to law, and is a resident of and is found in Louisburg, North Carolina, within the jurisdiction of this Court. During the period involved in this action, the First Citizens Bank and Trust Company was an "Approved Lending Agency" of Commodity Credit Corporation pursuant to the terms of a "Lending Agency Agreement" entered into by the said bank and the said Corporation, more fully described hereinafter.

7. None of the defendants is, nor at any time mentioned herein was, in the military or naval forces of the United States or in the militia called into or actually employed in the service of the United States.

8. Commodity Credit Corporation (hereinafter referred to as CCC) is an agency and instrumentality of the United States, the plaintiff herein, and all the officers and employees of CCC are, and were at all times mentioned herein, persons in the Civil Service of the United States.

9. On July 23, 1948, CCC issued its 1948 Cotton Loan Instructions (13. F.R. 4338), a true and correct copy of which is annexed hereto, as a part hereof, marked "A",

announcing a 1948 Cotton Loan Program under which loans would be made available to producers upon 1948 crop cotton which they had produced, as authorized and directed by Section 8 of the Stabilization Act of 1942, as amended (56 Stat. 767; 50 U.S.C., App. 968) and the CCC Charter Act (62 Stat. 1070; 15 U.S.C. 714).

[fol. 42] 10. Said 1948 Cotton Loan Instructions provided that loans on eligible cotton would be made available to eligible producers, defined an eligible producer as any person producing cotton in 1948 in the capacity of landowner, landlord, tenant, or sharecropper, and defined eligible cotton as cotton which, among other requirements, had been produced by the person tendering it for a loan and which such person had a legal right to pledge as security for a loan. Said Instructions required a producer obtaining a loan on cotton to tender a duly executed 1948 Cotton Producer's Note and Loan Agreement (hereinafter referred to as a "Note"), a true and correct copy of a form of which is annexed hereto, as a part hereof, marked "B", listing the warehouse receipt numbers and description of the cotton and pledging the warehouse receipts representing the cotton as security for the loan.

11. On August 3, 1948, CCC and defendant First Citizens Bank and Trust Company entered into a Lending Agency Agreement, a true and correct copy of the blank form of which is annexed hereto as a part hereof marked "C", under which defendant First Citizens Bank and Trust Company was authorized to make loans to producers of 1948 crop cotton in accordance with the provisions thereof and said 1948 Cotton Loan Instructions upon tender by the producers of duly executed Notes and warehouse receipts representing the cotton. Said Lending Agency Agreement further provided that the date on each Note must be the date on which defendant First Citizens Bank and Trust Company made disbursement of the loan proceeds to the producer; that said defendant should not make a loan on cotton pursuant to said agreement, if to said defendant's knowledge, the cotton tendered by the producer was ineligible for a loan under the 1948 Cotton Loan Instructions; and that said defendant must tender all Notes evidencing loans made in accordance with said agreement to CCC and that CCC would pay said bank the face value of the [fol. 43] notes plus interest therein at the rate of 1½ per

cent per annum from the date of such Notes to the date of payment by the CCC. The Lending Agency Agreement entered into by the CCC and the First Citizens Bank and Trust Company was executed on behalf of the Bank by defendant, A. E. Henderson, Cashier.

12. During 1948 the defendants did enter into an agreement, combination or conspiracy, and did agree, combine, and conspire to defraud the Government of the United States, or a department or officer thereof, by obtaining or aiding to obtain the payment or allowance of false and fraudulent claims under said 1948 Cotton Loan Program as herein set forth, to plaintiff's damages.

13. During the 1948 cotton marketing season the defendant Frederick L. Toepleman and Garland Greenway doing business as a partnership under the name of Garland Greenway, purchased at least 325 bales of cotton from various producers and other persons including defendant, Walter B. Moseley. The defendants, Toepleman and Greenway, induced various producers and other persons including Moseley to execute 82 Notes, many of which were executed in blank. These Notes were used to obtain loans from CCC on cotton which had been purchased by Toepleman and Greenway, and which was therefore ineligible.

14. Following the sale of 168 bales of cotton to Toepleman and Greenway by Walter B. Moseley, Moseley furnished Toepleman and Greenway, at their request 41 of the 82 Notes mentioned in paragraph 13, including some falsely executed by him as producer, and some executed in blank by the producers, for the purpose of enabling Toepleman and Greenway to obtain loans on the cotton under the 1948 Cotton Loan Program. Toepleman and Greenway did obtain said loans, and Moseley thus caused to be made or caused to be presented for payment or approval to [fol. 44] persons or officers in the Civil Service of the United States, 41 claims upon or against the Government of the United States, or a Department or officer thereof knowing such claims to be false, fictitious or fraudulent to plaintiff's damage.

15. Defendants, Toepleman and Greenway, listed or caused to be listed on the 82 Notes referred to in paragraph 13 hereof, the warehouse receipt numbers and descriptions of the 325 bales of cotton purchased by said defendants during the 1948 marketing season, and presented such

Notes, or caused such Notes to be presented, to CCC and requested payment thereof.

16. Each of the 82 Notes contained the representations and warranty that the person executing the Note had produced the cotton listed on the Note; that he had the legal right to pledge the cotton as collateral security for the loan; that the benefits of the loan evidenced by the Note would accrue solely to the producer and any tenants or sharecroppers having an interest in the cotton or its proceeds; that the benefits of the loan had not been transferred to any other party by way of assignment, sale, or option; and that he was eligible for a loan on the cotton under said 1948 Cotton Loan Instructions; whereas in fact said representations, warranties, entries and certifications were false, fictitious and fraudulent and known to be false, fictitious, and fraudulent by all of the defendants.

17. Of the 82 Notes referred to in paragraph 13 hereof, 9 Notes were submitted to CCC by the defendant First Citizens Bank and Trust Company, as Notes evidencing loans made by said Bank pursuant to the Lending Agency Agreement referred to in paragraph 11 hereof. The defendants, First Citizens Bank and Trust Company and A. E. Henderson, falsely certified on each of the said 9 Notes submitted to CCC by the First Citizens Bank and Trust Company as Lending Agency, that they believed that the cotton listed on each Note was "eligible cotton" as de-
[fol. 45] fined in the 1948 Cotton Loan Instructions, and that the proceeds of the loan evidenced by the Note had been paid on the date shown on the Note and in the manner directed by the producer obtaining the loan. Both the said Bank and its officer aforementioned knew that the cotton listed on the Notes was ineligible for loan because it had not been pledged by the producers thereof and they knew that the proceeds of the said Notes had not been paid on the date shown on the Notes and in the manner directed by the producers obtaining the loans.

18. The defendants made or caused to be made, or presented or caused to be presented, for payment or approval to persons or officers in the Civil Service of the United States the number of claims below listed upon or against the Government of the United States, or a Department or officer thereof, knowing such claims to be false, fictitious, or fraudulent to plaintiff's damage, and the defendants

for the purpose of obtaining or aiding to obtain the payment of said false claims, made, used or caused to be made or used false certifications knowing the same to contain fraudulent or fictitious statements or entries:

Toepleman and Greenway—82 false claims;
Walter Moseley—41 false claims;
Henderson and the First Citizens Bank and Trust Company—9 false claims.

19. Each of the false claims was approved by a person in the Civil Service of the United States and plaintiff, acting through CCC, paid such claims so that the defendants thereby fraudulently obtained payments to which they were not entitled.

20. By reason of the promises and pursuant to the provisions of Section 5438 and 3490, Revised Statutes, each of the defendants, Frederick L. Toepleman and Garland Greenway became and is liable to forfeit and pay to the United States the sum of $2,000.00 for each of the 82 false claims referred to in paragraph 18 hereof, and, in addition, [fol. 46] double the amount of the damages sustained by the United States by reason of the acts complained of, together with interest and the costs of this suit; and defendant, Walter B. Moseley, became and is liable jointly and severally with the defendants Toepleman and Greenway to forfeit and pay to the United States the sum of $2,000.00 for each of 41 of the 82 false claims referred to above, and, in addition, double the amount of the damages sustained by the United States by reason of the acts complained of, together with interest and the costs of this suit; and each or the defendants A. E. Henderson and the First Citizens Bank and Trust Company became and is liable jointly and severally with the defendants Toepleman and Greenway, to forfeit and pay to the United States the sum of $2,000.00 for each of 9 of the false claims referred to above, and, in addition, double the amount of the damages sustained by the United States by reason of the acts complained of, together with interest and the costs of this suit.

Wherefore, plaintiff demands judgment against each of the defendants Frederick L. Toepleman and Garland Greenway in the sum of $164,000.00; and plaintiff demands judgment against Walter B. Moseley in the sum of $82,-

000.00; and plaintiff demands judgment against each of the defendants, A. E. Henderson and First Citizens Bank and Trust Company in the sum of $18,000.00; plus, with respect to each defendant, double the amount of the damages which this Court shall find, together with interest and costs of this suit.

(S.) Julian T. Caskill, United States Attorney;
(S.) Lawrence Harris, Assistant United States Attorney.

[fol. 47] IN UNITED STATES DISTRICT COURT

ANSWER OF FREDERICK L. TOEPLEMAN, INDIVIDUALLY, AND AS MEMBER OF THE PARTNERSHIP OF FREDERICK L. TOEPLEMAN AND GARLAND GREENWAY, DOING BUSINESS AS GARLAND GREENWAY

Frederick L. Toepleman, individually, and as a member of the partnership of Frederick L. Toepleman and Garland Greenway, doing business as Garland Greenway, for answer to the plaintiff's complaint, says:

1. That the allegations of paragraph one of said complaint are not denied.

2. That the allegations of paragraph two of said complaint are not denied.

3. That the allegations of paragraph three of said complaint are denied.

4. That this defendant neither admits nor denies the allegations of paragraph four of said complaint for the reason that said paragraph does not relate to or effect this defendant.

5. That this defendant does not have sufficient knowledge or information to enable him to form a belief as to the truth of the allegations of paragraph five of said complaint and he therefore denies said allegations.

6. That this defendant does not have sufficient knowledge or information to enable him to form a belief as to the truth of the allegations of paragraph six of said complaint and he therefore denies said allegations.

7. For answer to paragraph seven of said complaint this defendant admits that he is not in the military or naval forces of the United States or in the militia called into or actually employed in the service of the United States.

8. That this defendant does not have sufficient knowledge or information to enable him to form a belief as to the truth [fol. 48] of the allegations of paragraph eight of said complaint and he therefore denies said allegations.

9. That this defendant does not have sufficient knowledge or information to enable him to form a belief as to the truth of the allegations of paragraph nine of said complaint and he therefore denies said allegations.

10. That this defendant does not have sufficient knowledge or information to enable him to form a belief as to the truth of the allegations of paragraph ten of said complaint and he therefore denies said allegations.

11. That this defendant does not have sufficient knowledge or information to enable him to form a belief as to the truth of the allegations of paragraph eleven of said complaint and he therefore denies said allegations.

12. That the allegations of paragraph twelve of said complaint are untrue and this defendant denies said allegations.

13. That this defendant denies the allegations of paragraph thirteen of said complaint, as stated.

14. That this defendant denies the allegations of paragraph fourteen of said complaint, as stated.

15. That this defendant denies the allegations of paragraph fifteen of said complaint, as stated.

16. That this defendant denies the allegations of paragraph sixteen of said complaint, as stated.

17. That this defendant denies the allegations of paragraph seventeen of said complaint, as stated.

18. That the allegations of paragraph eighteen of said complaint are untrue and this defendant denies said allegations.

19. That the allegations of paragraph nineteen of said complaint are untrue and this defendant denies said allegations.

20. That the allegations of paragraph twenty of said complaint are untrue and this defendant denies said allegations.

[fol. 49] Wherefore, having fully answered, this defendant prays that the plaintiff recover nothing of him individually or as a partner of Garland Greenway, and that

this defendant go hence and recover of the plaintiff his costs of action to be taxed.

Frank W. Hancock, Jr., Attorney for Frederick L. Toepleman, Individually, and as a Partner of Garland Greenway; B. S. Royster, Jr., Attorney for Frederick L. Toepleman, Individually, and as a Partner of Garland Greenway.

In United States District Court

Memorandum By The Court With Findings of Fact and Conclusions of Law

This action was instituted against several defendants, but prior to the hearing a dismissal was entered with respect to all defendants other than Frederick L. Toepleman and Garland Greenway.

The claim of the Government is made under the False Claims Act, Title 31, Sec. 231-233. Section 231 reads, so far as pertinent here: "Any person . . . who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person . . . any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of [fol. 50] obtaining or aiding to obtain the payment or approval of such claim, makes, uses or causes to be made or used, any false bill, receipt, voucher . . . claim . . . knowing the same to contain any fraudulent or fictitious statement . . . or who enters into any agreement . . . or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim . . . shall forfeit and pay to the United States the sum of $2,000.00, and, in addition, double the amount of damage which the United States may have sustained . . . , together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit." Jurisdiction is given by Section 232.

Defendants advance certain arguments, any one of which, if decided adversely to the Government, would make

it unnecessary to consider the case on its factual merits. These arguments will now be considered.

It is contended that the action is barred by Section 2462, Title 28, which reads "Except as otherwise provided by Act of Congress, an action . . . for the enforcement of any civil fine, penalty, or forfeiture . . . shall not be entertained unless commenced within five years from the date when the claim first accrued . . ." The commission of the acts upon which the claim is based occurred more than five years before the commencement of the action, and, therefore, the claim is barred if the quoted statute applies. I am of the opinion, however, that it does not, but rather that Section 235, Title 31, applies. This statute is found in the chapter dealing with debts due by or to the United States, of which the False Claims Act is a part, and reads: "Every such suit shall be commenced within six years from the commission of the act, and not afterward." This provision, therefore, applies specifically to actions for forfeitures and damages based on false claim, such as this. The [fol. 51] acts complained of were committed within the six-year period just before the action was commenced and there is no statutory bar. In United States v. Berin, 209 F. 2d 145, the six-year statute was held applicable, though it does not appear that the applicability of the five-year statute was advanced as an apparent argument.

Another argument of defendants is that even if false claims were filed by defendants they were not filed "upon or against the Government of the United States, or any departure or officer thereof" within the words or spirit of the statute, since the Commodity Credit Corporation, against whom the evidence shows the claims were filed, is not a "department" or "officer" of the United States, and that the action is improperly brought in the name of the Government as plaintiff.

The Commodity Credit Corporation, as it now exists, was created by Congress by act which became effective June 29, 1948, and in the first paragraph, Sec. 714, Title 15, we find that Congress declared: "(The Corporation) . . . shall be an agency and instrumentality of the United States, within the Department of Agriculture . . ." The United States owns all the capital stock and the money used to pay the fraudulent claims alleged to have been filed was that of

the United States. It appears plain that the Commodity Credit Corporation is a department of the United States, if not the United States itself, within the meaning of the statute. This statute has been construed broadly "to reach any person who knowingly assisted in causing the Government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government." United States, Ex Rel. Marcus v. Hess, 317 U.S. 537, 544. The purpose of the statute was to prohibit the drawing of any money from the Treasury of the United States upon any false claim.

[fol. 52] With respect to the position of defendants to the effect that the action was instituted improperly in the name of the United States, it is sufficient only to refer to the statutes. Secion 231 provides that the guilty party "shall forfeit and pay to the United States" and Section 232 clearly contemplates that the action may be brought either by the United States or, under some circumstances, by an informer in the name of the United States. The action is properly brought in the name of the United States.

Let us now come to a consideration of the case on its merits.

At all times involved, Frederick L. Toepleman and Garland Greenway, the defendants, were residents of Vance County, North Carolina.

During the period from July, 1948, through June, 1949, defendants were partners under the name "Garland Greenway", with offices in Henderson and Louisburg.

At no time was either defendant in the military or naval forces of the United States or in the militia called into or actually employed in the service of the United States.

The Commodity Credit Corporation was and is an agency and instrumentality of the United States within the Department of Agriculture whose officials and employees were and are persons in the Civil Service of the United States.

During the cotton marketing year from July 1, 1948, through June 30, 1949, the Commodity Credit Corporation conducted the Cotton Loan Program as authorized by its charter, the statutes, and regulations published at 13 F. R. 4338. Under this program non-recourse loans were provided for an eligible producer, who had to be a person who

produced cotton in 1948, on eligible cotton, which had to be produced by the person tendering it for a loan.

To obtain a loan under the program an eligible producer had to tender a duly executed 1948 Cotton Producer's Note [fol. 53] and Loan Agreement to Commodity Credit Corporation, either directly or indirectly through one of its approved lending agencies, listing the warehouse receipt numbers and description of eligible cotton as security for the non-recourse loan.

Commodity entered into separate Lending Agency Agreements with the First National Bank, Henderson, N. C., and First Citizens Bank & Trust Co., Louisburg, N. C., covering loans under the 1948 prgram. Each agreement authorized the agency bank to make loans to producers in accordance with the provisions of the 1948 Loan Instructions. Commodity agreed to reimburse the agency bank for all loans advanced in accordance with the loan instructions.

The defendants obtained eighty-two 1948 Producer's Notes which were unexecuted except for signatures in blank by R. B. Baird, Ashton Davis, Olie Gupton, E. B. Jones, John Lambert, S. A. Moseley, W. B. Moseley, J. T. Parrish, W. T. Paschall, F. G. Poythress, Robert Wilkins, Herman Winn, Shelton Wright and J. T. Wright.

The partnership of Toepleman and Greenway purchased from various sources 325 bales of 1948 cotton, using partnership funds.

The defendant Toepleman listed or caused to be listed on the eighty-two notes signed in blank the warehouse receipt numbers and description of the 325 bales of cotton purchased from various sources by the partnership. The partnership held full title to and owned the 325 bales at the time they were listed on the 82 notes and at the time the notes and warehouse receipts were tendered to the lending agencies.

The partnership, through Toepleman, tendered 57 of the notes to the First National Bank and 25 of them to First Citizens Bank and Trust Company, to obtain loans under the 1948 program and requested a disbursement of the loan proceeds. Each bank disbursed to the partnership the loan [fol. 54] proceeds of the notes tendered to it, and made no disbursement to the producers listed on the notes. The full proceeds of the 82 notes were received by the partnership.

The banks then transmitted the 82 notes to Commodity and received from it reimbursement for the loan proceeds paid to the partnership. The First National Bank transmitted 57 of the notes by ten letters of transmittal, and the First Citizens Bank & Trust Company 25 notes by four letters of transmittal.

Thirty-nine of the notes were paid by the partnership in March, 1949, and the cotton security redeemed, so that Commodity suffered no loss on those loans. Forty-three of the notes were not paid at maturity and the unredeemed cotton securing these loans was sold on January 11, 1955, for $6,733.97 less than the face of such notes, resulting in a loss to plaintiff in that amount.

The activities above set forth were accomplished by the partnership, but all transactions were handled by Toepleman and Greenway had no actual knowledge of the pledge of any bale of ineligible cotton. Toepleman, of course, had actual knowledge that every bale pledged on the eighty-two notes was ineligible because not produced by the borrower.

Having determined that the defendant Greenway is not liable to plaintiff in any event, I will dispose of the case as to him first, leaving certain questions pertinent to the case against Toepleman for later discussion. As a basis of liability it must appear that a false claim was filed "knowing such claim to be false." I have found, and I think even the evidence for plaintiff shows, that the defendant Greenway had no personal knowledge of any false claim against the plaintiff. It is suggested that the Court should find the two defendants entered into a conspiracy to file the false claims, but I find on the evidence that no such conspiracy existed. It may be logically argued that Greenway was careless in his attitude toward the partnership affairs and [fol. 55] that closer attention would have prevented the filing of the false claims. I find this as a fact, but I deem such finding far short of a finding that there was a conspiracy between the partners. It is argued also that even if Greenway was actually ignorant of the fact that Toepleman was filing false claims, he is liable because of his relation as partner to Toepleman, citing North Carolina G. S. 59-43, which is in these words: "(w)here, by any wrongful act or omission, of any partner acting in the ordinary course of business of the partnership or with the authority

of his copartners, loss or injury is caused to any person, not being a partner . . . or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act." It is my opinion that this statute does not sustain plaintiff's position. It should be noted that the North Carolina statute says "the partnership is liable", not each partner. This is not an action against the partnership. Partnership assets might possibly be applied to the payment of the forfeitures and damages, but this action is against Greenway as an individual, not as a partner. It is urged that the statute applies because it uses the word "penalty", but actually this not an action for penalties. Helvering, Commissioner v. Mitchell, 303 U. S. 391. No helpful decision on this point has been cited or found, but Greenway's counsel note the decisions construing Sec. 32, Sub-section c (1), Title 11, denying discharge to a bankrupt who has committed the offense "of having knowingly and fraudulently . . . (made) a false oath . . . in relation to any bankruptcy proceeding . . ." The majority rule seems to be that a false statement made by one partner, unknown to an innocent partner, will not support denial of discharge to such innocent partner. In re Josephson, et al., 229 F. 272.

I find that the defendant Greenway is not liable to plaintiff as under the evidence it does not appear that he made [fol. 56] a false claim knowing it to be "false, fictitious or fraudulent", and that he is not liable to plaintiff by reason of the partnership relationship with defendant Toepleman, who, of course, knew that the cotton pledged in the notes was ineligible for loans under the act.

Although the defendant Toepleman does not deny either that each of the eighty-two notes pledged ineligible cotton, that is, cotton not produced by the borrower, or that such fact was known to him, his counsel advance several arguments against liability under the statute. One of such arguments is that the presentation of a note to a lending agency bank representing Commodity which is false in that ineligible cotton is pledged, does not constitute the filing of a false claim within the meaning of the statute. I am referred to United States v. McNinch, 138 F. Supp. 711, and the following language of the Court: "It seems evident that, if the statute is n[illegible] to apply here, it will be after the

Court has effected some very drastic amendments to the act, such as holding a credit application directed to a bank is the same as a 'claim upon or against the government of the United States, or any department, or officer thereof', the bank, of course, being regarded as the government, or a department thereof." With all respect I disagree. Commodity, under the act, was obligated to make loans on eligible cotton, the banks were authorized agents of Commodity, and Commodity is a Department of the United States within the meaning of the statute, as above pointed; so that I see no reason why the filing of application for a loan which is false should not be considered filing a false claim against the "government of the United States, or any department or officer thereof". As quoted above, (the statute has been construed broadly) "to reach any person who knowingly assisted in causing the government to pay [fol. 57] claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government".

In this connection, it should be borne in mind that the notes which were tendered to Commodity were not the ordinary Commercial notes, since the government under the program had no recourse upon the makers. The maker (supposedly the producer) could in each instance pay the loan before maturity and redeem his cotton; in event of default the government is authorized to sell the cotton but must account to the producer for any surplus. The program, therefore, clearly contemplated a loss to the government to be paid out of Treasury funds. The government under the program did not agree to lend its money to speculators nor to purchase their cotton, but only agreed to give these benefits to producers on eligible cotton. So that when by false representation a person, as Toepleman, obtained a loan by which he could not suffer but by which the Government might suffer loss, he was getting benefits to which he was not entitled, and in my view this constituted filing a false claim within the meaning of the statute.

Toepleman's counsel also insist that there is no liability because the plaintiff was not damaged. Leaving to the side for this argument that there is evidence of damage in respect to forty-three of the notes, it appears to me that the Government's case is made by showing that a false claim

was knowingly filed and that it is unnecessary to show either an intent to defraud or resulting damage. In some of the clauses of the act it is expressly provided that there must be shown an intent to defraud, but in the clause applicable here no such words are used. Proof of knowingly presenting a false claim is all that is required. The wording of the statute strongly indicates that recovery is not dependent upon proving loss or damage, since it there stated that a person doing the prohibited acts "shall for- [fol. 58] feit and pay to the United States the sum of $2,000.00, and, in addition, double the amount of damage." Had the intent of Congress been that proof of damage is essential, it seems reasonable to infer that the wording would have been such as: where damage to Government is shown, the offender shall pay double the amount of same, and, in addition, shall forfeit the sum of $2,000.00. Nor, in my opinion, was it necessary for the plaintiff to prove profit to Toepleman.

See Rex Trailer Co. v. United States, 350 U. S. 145, 152: "It is insisted, however, that the failure of the Government to allege specific damages precludes recovery here. But there is no requirement, statutory or judicial, that specific damages be shown, and this was recognized by the Court in Marcus."

Toepleman's counsel further insist that if plaintiff is entitled to recover anything the recovery should be limited to one forfeiture of $2,000.00, treating the dealings of Toepleman as a single transaction, but I am unable to see it. Each note constituted a false claim and plaintiff should recover $2,000.00 in each instance, or $164,000.00. The Marcus case sustains this conclusion.

The remaining question is whether the plaintiff is entitled to recover anything for damages. I think not. According to the wording of the statute, where a false claim is filed the one so filing "shall forfeit an pay to the United States the sum of $2,000.00, and in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act." Obviously, "such act" means the presenting of the false claim and the Government actually was not specifically damaged by reason of the falsity of the claim. It is true the Government lost money on some of the transactions but such loss did not

result because ineligible cotton was pledged. The market value of the cotton was the same as it would have been had [fol. 59] it been producer's cotton, and the loss here where the Government held the cotton over six years would have been exactly the same had every bale of the cotton been eligible for loan and, consequently, no false claims filed. The Government's loss was due to the drop in the price in cotton, not to the drop in the price of ineligible cotton. There was no damage to the Government within the meaning of the statute.

So that, the Government is not entitled to recover of the defendant Garland Greenway, but is entitled to recover $164,000.00 of the defendant Frederick L. Toepleman, together with the costs. He is entitled, as the Government agrees, to a credit of $2,000.00 heretofore paid without prejudice.

Judgment accordingly will enter.

Don Gilliam, United States District Judge.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, RALEIGH DIVISION

No. 822 Civil

UNITED STATES OF AMERICA, Plaintiff,

vs.

FREDERICK L. TOEPLEMAN and GARLAND GREENWAY, Defendants

JUDGMENT

The above-entitled action came on for trial before the Court, without a jury, on the 13th day of March, 1956 at Raleigh, North Carolina, the plaintiff appearing by attor- [fol. 60] ney, Department of Justice, and Assistant United States Attorneys for the Eastern District of North Carolina, and the defendant Frederick L. Toepleman appearing in person and by B. S. Royster, Jr., and F. W. Hancock, Jr., esqs. of Oxford, North Carolina, and the defendant Garland Greenway appearing in person and by Banzet and Banzet, attorneys of Warrenton, North Carolina, and evi-

dence having been offered by all parties, and the Court having filed its Findings of Fact, Conclusions of Law, and Order for Judgment herein, now, pursuant to said Order for Judgment:

It is hereby Ordered and Adjudged that the plaintiff United States of America have Judgment against the defendant Frederick L. Toepleman in the sum of One Hundred Sixty-four Thousand ($164,000.00) Dollars, together with interest thereon at the rate of 6% per annum from the date of entry of this Judgment, until paid; that the sum of Two Thousand ($2,000.00) Dollars heretofore paid, without prejudice, to the plaintiff by the said defendant Frederick L. Toepleman be applied to the instant Judgment; and for the costs of the instant action, including the attorney's docket fee, to be taxed by the Clerk of this Court; and

It is further Ordered and Adjudged that the plaintiff United States of America recover nothing of the defendant Garland Greenway.

The Clerk of this Court will certify a transcript of this Judgment, in duplicate, for docketing in the office of the Clerk of the Superior Court of Vance County, North Carolina.

Don Gilliam, United States District Judge.

[fols. 61-62]

Appendix to Brief of the United States as Appellee and Cross-Appellant—Filed January 7, 1957

[fol. 63] IN UNITED STATE DISTRICT COURT

ANSWER OF GARLAND GREENWAY.

The defendant Garland Greenway for Answer to the Complaint alleges:

1. The defendant Garland Greenway admits paragraph One of the Complaint.

2. The defendant Garland Greenway admits paragraph Two of the Complaint.

3. The defendant Garland Greenway denies paragraph Three of the Complaint.

4. The defendant Garland Greenway admits paragraph Four of the Complaint.

5. The defendant Garland Greenway admits paragraph Five of the Complaint.

6. The defendant Garland Greenway admits paragraph Six of the Complaint.

7. The defendant Garland Greenway admits paragraph Seven of the Complaint.

8. The defendant Garland Greenway admits that part of paragraph Eight which alleges that the Commodity Credit Corporation is an agency and instrumentality of the United States but alleges that he without knowledge or information sufficient to form a belief as to the truth of the other allegations of paragraph Eight.

9. The defendant Garland Greenway admits paragraph Nine of the Complaint.

10. The defendant Garland Greenway admits paragraph Ten of the Complaint.

11. The defendant Garland Greenway alleges that he is without knowledge or information sufficient to form a [fol. 64] belief as to the truth of the allegations contained in paragraph Eleven of the Complaint.

12. The defendant Garland Greenway denies the allegations of paragraph Twelve of the Complaint.

13. The defendant Garland Greenway admits that on occasions, not pertinent to plaintiff's alleged cause of action, and not as a partner of Frederick L. Toepleman, he induced producers to sign notes in blank, but denies all other allegations of paragraph Thirteen.

14. The defendant Garland Greenway denies the allegations of paragraph Fourteen.

15. The defendant Garland Greenway denies the allegations of paragraph Fifteen.

16. The defendant Garland Greenway alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph Sixteen of the Complaint.

17. The defendant Garland Greenway alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph Seventeen of the Complaint.

18. The defendant Garland Greenway denies the allegations of paragraph Eighteen.

19. The defendant Garland Greenway denies the allegations of paragraph Nineteen of the Complaint.

20. The defendant Garland Greenway denies the allegations of paragraph Twenty of the Complaint.

For further answer and defence, the defendant Garland Greenway alleges:

First Defence

The claim stated in the Complaint did not accrue within five (5) years before the commencement of this action and is therefore barred by the provisions of Section 2462 of Title 28, United States Code.

Wherefore, the defendant Garland Greenway prays that [fol. 65] the plaintiff recover nothing by its action and demands trial by jury on the issues raised by the pleadings.

Frank Banzet, Attorney for the Defendant, Garland Greenway.

In United States District Court

C. C. C. Cotton Form D

U. S. Department of Agriculture

Commodity Credit Corporation

Government Exhibit G-3

Original

Lending Agency Agreement

Covering Loans on Cotton of the 1948 Crop

This Agreement made and entered into as of the 4th day of Aug., 1948, by and between Commodity Credit Corporation (hereinafter referred to as CCC), an agency of the United States, and First National Bank, Henderson, North Carolina (hereinafter referred to as the "Lending Agency").

Witnesseth:

Whereas CCC has undertaken a Cotton Loan Program for cotton of the crop specified above and has issued Cotton

Loan Instructions (C. C. C. Cotton Form 1, hereinafter referred to as the "Instructions") for such program for setting out the terms and conditions under which producers may obtain loans secured by cotton of such crop, which Instructions and any amendments and supplements thereto are hereby made a part of this agreement and are to apply hereto the same as though they were expressly rewritten and included herein; and

Whereas CCC desires to facilitate completion of such loans and the Lending Agency desires to make such loans; [fol. 66] Now Therefore, in consideration of the premises and the mutual covenants and agreements herein contained, the parties hereto agree for themselves, their successors, and their assigns, as follows:

1. On and after the date of execution of this Agreement by the Lending Agency and CCC, the Lending Agency may make loans in accordance with the provisions of the Instructions and this Agreement to producers of cotton of the crop specified above. Such loans shall be made upon tender by the producers of duly executed Cotton Producer's Note and Loan Agreement (C. C. C. Cotton Form A) (hereinafter referred to as "notes") and warehouse receipts representing such cotton and meeting the requirements of the Instructions. Such notes shall be used by the Lending Agency only in making loans under this Agreement. The date of each note must be the date on which the Lending Agency makes disbursement of the loan proceeds to the producer. The Lending Agency shall not make a loan on cotton pursuant to this Agreement if, to its knowledge, the cotton is damaged, destroyed, or impaired, is subject to any prior lien or encumbrance, or is otherwise ineligible for a loan under the Instructions. The Lending Agency shall not make any deduction for interest, commission, exchange, or other charges (except the authorized Clerk's fee, in case the Lending Agency has executed the Clerk's Certificate on the note) from the amount of any loan hereunder.

2. The Lending Agency shall tender all notes evidencing loans which it has made in accordance with the provisions of section 1 hereof, together with the warehouse receipts representing the cotton securing such notes, to the New Orleans Office, Commodity Credit Corporation, Produc-

tion and Marketing Administration, New Orleans 12, La., [fol. 67] within 15 days after the date of such notes. Such tender shall be made by a duly executed Lending Agency's Letter of Transmittal (C. C. C. Cotton Form C), in triplicate, stating whether the notes are transmitted for purchase or for pooling. All of the notes tendered on any one letter of transmittal must be secured by cotton stored in the same custodial district, as defined in the Instructions. Forty notes shall be submitted on each letter of transmittal except when fewer notes are listed in order that they may be tendered within 15 days after execution. One copy of the letter of transmittal will be returned to the Lending Agency and will constitute a receipt for the notes. All notes tendered hereunder will be examined by CCC and notes found to be unacceptable will be returned. Notes returned will be accepted if retendered in acceptable form.

3. If notes tendered pursuant to section 2 hereof are tendered for purchase, CCC shall, as soon as practicable, pay to the Lending Agency the face value of the notes accepted plus interest thereon at the rate of 1½ percent per annum from the respective dates of such notes to the date of payment of the purchase price by CCC.

4. If notes tendered pursuant to section 2 hereof are tendered for pooling, the notes which are accepted shall be placed in a pool, which shall be operated by CCC as follows:

(*a*) A separate pool shall be established in each custodial district, as defined in the Instructions, for the notes secured by cotton stored in that district, and the custodial office for the district shall act as custodian of the pool.

(*b*) The custodial office shall issue to the approved Lending Agency designated in the letter of transmittal on which the notes were tendered a Certificate of Interest (C. C. C. Cotton Form H) (hereinafter re- [fol. 68] ferred to as a "certificate") in a face amount equal to the face amounts of the notes deposited, evidencing the deposit of such notes in the pool pursuant to this Agreement. The face amount of the certificate, less payments thereon, shall constitute the value of the certificate, which shall bear interest from the date of issuance at the rate of 1½ percent per annum payable

at the time and upon the amount of each payment made upon the certificate.

(*c*) The custodial office, upon issuing a certificate, shall act as custodian thereof for the certificate holder until it is retired or purchased by CCC and shall, as promptly as possible after issuing the certificate, furnish the certificate holder with a copy thereof. The custodial office shall enter on the reverse side of the certificate all payments made thereon. When any certificate is retired by payment to the holder of the value thereof, plus interest, the certificate shall be canceled. Canceled certificates shall be retained by the custodial office.

(*d*) At the time of the issuance of a certificate, CCC shall pay to the certificate holder interest at the rate of 1½ percent per annum upon the face amounts of the notes whose deposit it evidences from the respective dates of such notes to the date of issuance of the certificate.

(*e*) A certificate may be transferred only upon the following conditions: A transfer may be made only to another lending agency which has entered into a Lending Agency Agreement with CCC covering cotton of the crop specified above. Only two transfers of the certificate may be made. A transfer may be made only by an assignment of Certificate of Interest (C. C. C. Cotton Form I and will be effective only upon the receipt and acceptance of such form by CCC. An assignment received during the first 10 days of any month will not be accepted [fol. 69] and will not be effective until the end of such period, and any payment upon the certificate during such period will be made to the transferror rather than the transferee.

(*f*) CCC may, and shall upon demand by the certificate holder, purchase any outstanding certificate at any time by paying to the certificate holder the value thereof plus accrued interest. Upon such purchase the certificate shall be canceled by the custodial office, but CCC shall participate in the pool to the same extent as if the certificate had not been canceled.

(*g*) CCC may deposit in the pool any notes held by

CCC or other documents evidencing loans made by CCC under such program. No certificate shall be issued to CCC to evidence the deposit of such notes and documents, but CCC shall participate in the pool in the same manner as if a certificate had been issued.

(*h*) The proceeds obtained each month through collection or other appropriate credits to the principal amounts of the notes deposited in the pool, and any undistributed proceeds from previous months shall be divided during the 10-day period following the end of the month between CCC and certificate holders in the same proportion as the value of CCC's interest in the pool bears to the total value of all certificates outstanding on the last day of the month: *Provided, however,* That such distribution shall not be made if CCC determines that such action is impracticable. That part of the pool proceeds which is to be paid to the certificate holders shall be divided among them in proportion to the total value of the certificates held by each certificate holder, and such payments shall be credited by the custodial office against the certificate held by each certificate holder which have been outstanding for the longest time: *Provided, however,* That if such credit would reduce the value of any certificate [fol. 70] to less than $100, the payment to the certificate holder may be increased by an amount sufficient to retire the certificate; *And provided further,* That the payment to any certificate holder shall not exceed the total value of the certificates which he holds.

(*i*) Any proceeds, notes, and other loan documents remaining in the pool after all of the certificates have been retired shall become the property of CCC.

(*j*) If any certificates have not been retired upon final liquidation of the pool, CCC shall pay to the holders of the certificates the value thereof, plus interest.

5. In any case in which the Lending Agency has actual knowledge at the time a loan is made that the borrower has made a fraudulent representation in obtaining the loan, the Lending Agency shall be liable for any loss incurred as a result of the making of such loan.

6. The Corporation shall have the right to terminate this Agreement by giving the Lending Agency 10 days' written

notice of its intention to do so, but such termination shall not affect the rights and obligations of the parties hereto with respect to loans made by the lending agency prior to the effective date of such termination. Upon the effective date of such termination, the Lending Agency shall cease to make loans hereunder.

In Witness Whereof, the parties hereto have caused this Agreement to be executed on the date set forth above.

[fol. 71] Commodity Credit Corporation, by —— —— (Contracting officer), —— —— (Lending agency), By —— ——, (Title).

Attest: —— —— (Title).

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, RALEIGH DIVISION

No. 822 Civil

UNITED STATES OF AMERICA

vs.

FREDERICK L. TOEPLEMAN AND GARLAND GREENWAY, AS INDIVIDUALS; Frederick L. Toepleman and Garland Greenday, partners dba Garland Greenway, Walter B. Moseley, A. E. Henderson, First Citizens Bank & Trust Company, Louisburg, North Carolina.

TRANSCRIPT OF TESTIMONY—March 12, 1956

APPEARANCES:

For the Government:

Mr. William Barton, of the Department of Justice.
Miss Jane A. Parker, Assistant United States Attorney.
Mr. Lawrence Harris, Assistant United States Attorney.

For the defendant Frederick L. Toepleman:

Mr. B. S. Royster, of Oxford, N. C.
Mr. F. B. Hancock, Jr., of Oxford, N. C.

[fol. 72] For the defendant Garland Greenway: Messrs. Banzet & Banzet, of Warrenton, N. C.

All parties agree that the case is to be tried without a jury.

Mr. Barton. This is a suit under the false claims act for double claims and forfeitures for submitting false claims under the 1948 cotton program and the allegation is that, the defendants Greenway and Toepleman entered into an agreement, combination and conspiracy in entering false notes. That they carried this out and submitted some eighty-two false notes pledging cotton representing that farmers themselves were pledging it and according to the Statute the government is asking for double damage. The statute says $2,000 forfeiture for each false claim. Certainly a question for the Court to determine is what is a false claim.

The Court. How many bales were there?

Mr. Barton. Three hundred and twenty-five and listed in 82 notes. It says false, fictitious, fraudulent claims.

The Court. If he were to include one that he thought came within the provision of the act but as a matter of fact was wrong about it would he be liable?

Mr. Barton. We are alleging that actually the defendants put cotton in the loan in the names of various farmers. Those farmers had a perfect right to put cotton in the loans which they had produced in their own names and in their own notes but Mr. Toepleman and Mr. Greenway couldn't come in and put cotton in it to make a profit.

The Court. They had to grow it themselves.

Mr. Barton. Yes, sir.

Mr. Harris: The claim against W. B. Moseley, A. E. [fol. 73] Henderson and the First Citizens Bank & Trust Company has been settled.

Frank G. Poythress, being sworn, testified as follows:

Direct examination.

By Mr. Barton:

Q. State your name.
A. Frank G. Poythress.

Q. Where do you live?
A. Brunswick County, Virginia.
Q. What is your occupation?
A. Farming.
Q. Were you farming in 1948?
A. Yes, sir.
Q. Run a cotton gin in 1948?
A. Yes, sir.
Q. Buy cotton from people patronizing your gin?
A. Yes, sir.
Q. You bought and sold this cotton?
A. Yes, sir.
Q. Did you sell any cotton to the defendants in this case?
A. Yes, sir. I sold some to Mr. Toepleman.
Q. Did you sign any notes for Mr. Toepleman?
A. Yes, sir.
Q. How did that happen?

Objection by Defendant Toepleman.

A. Yes, I signed some.

(Short morning recess.)

Q. Mr. Poythress, you said earlier that you grew some cotton yourself in 1948.
A. Yes, sir.
Q. Did you put any of that cotton in Commodity Credit loan?
A. No, sir.
Q. I show you Government Exhibits 1 through B-19 and ask you if that is your signature on each one? Tell [fol. 74] the Court if that is your signature?
A. Yes, sir, they are mine. I signed all of them.

The Court. How many?

Mr. Barton. There are nineteen notes.

Q. Now those notes, which are in evidence, state that you executed note at the First National Bank at Henderson, and on some of them with the First Citizens Bank & Trust Company, Louisburg, North Carolina. Did you deal with those banks?

Objection by Defendant Toepleman overruled.

A. No, sir.

Q. Did you sign any 1948 notes in blank?

A. No, sir. That is the only note I signed.

Q. When you signed those notes when was it, and for whom?

A. I haven't signed any notes.

Q. These are notes.

A. When I signed those notes I told Mr. Toepleman, at least we had talked it over about putting some cotton in storage. He told me if I signed those blanks when I got ready to put it in storage, ship it on, and I wouldn't have to go to Henderson. That is why I signed for Mr. Toepleman.

Q. What did you do with your cotton on hand?

A. After those things stirred up and I heard about it——

Objection by Defendant Toepleman overruled.

Mr. Barton. The witness has testified he signed some of those notes for Mr. Toepleman. He also testified he put no cotton into the loan.

Q. You say you signed those notes for Mr. Toepleman because it would be easier for you when you shipped cotton to Henderson.

A. Yes, sir; my own cotton and put it in storage.

Q. Did you have some?

[fols. 75-76] A. Yes, sir.

Q. What did you do with it?

A. It was there until I got all mine together and I sold it.

Q. You know to whom?

A. Mr. White at Littleton.

The Court. Was all this cotton you had bought?

A. I don't know. I signed this in blank. After I got my cotton together I sold it to Mr. White.

Q. The hundred bales you shipped to Mr. Toepleman, was that what you bought from other growers at the gin?

A. That's right. The cotton those drafts were drawn on and weights and bales were on those drafts.

By Mr. Barton:

Q. Knowing you had signed those notes for Mr. Toepleman, did you later have contact with him about those notes?

A. I came to his house, I can't remember the date, and asked him what happened to them and he said he had used them but was going to redeem them.

The Court: You mean when you signed the notes there was nothing written into the blank, that it was just a blank form note?

A. Yes, sir.

Q. Didn't have any amount?

A. No, sir.

Q. Where it lists the cotton was that blank?

A. Nothing on here. I just signed them. He had some notes and we were in the office. My niece was there. He said, "You sign those notes and when you send your cotton over there we will put it in storage and that will save you trouble having to come and sign those papers."

[fol. 77] IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7321

FREDERICK L. TOEPLEMAN, Appellant,

versus

UNITED STATES OF AMERICA, Appellee,

and

UNITED STATES OF AMERICA, Appellant,

versus

FREDERICK L. TOEPLEMAN and GARLAND GREENWAY, Appellee

Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh

DOCKET ENTRIES

October 18, 1956, record on appeal filed and appeals docketed.

October 18, 1956, original exhibits received from the Clerk of the United States District Court.

October 20, 1956, appearance of B. S. Royster, Jr., entered for appellant Frederick L. Toepleman.

October 20, 1956, statement under section 3 of rule 10 filed.

October 20, 1956, petition of Clerk of the United States District Court for extension of time to file record on appeal filed.

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL AND DOCKETING APPEAL—Filed October 24, 1956

On consideration of the application of A. Hand James, Clerk of the United States District Court for the Eastern District of North Carolina, and for good cause shown, [fol. 78] It is ordered that the time for filing the record on appeal and docketing the appeal in the above entitled cause be, and it is hereby, extended to and including October 18, 1956.

October 23, 1956.

John J. Parker, Chief Judge, Fourth Circuit.

October 26, 1956, appearance of F. W. Hancock, Jr., entered for the appellant Frederick L. Toepleman.

November 2, 1956, appearance of Frank Banzet entered for the appellee Garland Greenway.

November 3, 1956, appearance of Melvin Richter, Attorney, and William W. Ross, Attorney, Department of Justice, entered for the appellant United States of America.

December 22, 1956, stipulation as to the time for filing briefs filed.

January 2, 1957, brief and appendix of appellant Toepleman filed.

January 7, 1957, stipulation as to the time for filing briefs filed.

January 7, 1957, brief and appendix for the United States as appellee and cross-appellant filed.

[fol. 79] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7321

UNITED STATES OF AMERICA, Appellant,

vs.

GARLAND GREENWAY, Appellee

NOTICE OF MOTION—Filed January 10, 1957

To the Honorable Attorney General of the United States, Attorney for United States of America, Appellant:

You will please take notice that Garland Greenway, Appellee, will move before the Honorable United States Court of Appeals for the Fourth Circuit, in the City of Charlotte, North Carolina, at 9:30 o'clock A. M., on the 14th day of January, 1957, or as soon thereafter as counsel may be heard, to dismiss the case for that the said Appellant has failed to file its brief twenty (20) days before the term to which the case is docketed for hearing.

This 9th day of January, 1957.

Garland Greenway, Appellee, by Frank Banzet, His Attorney.

Frank Banzet, Court House Square, Warrenton, N. C., Attorney for Appellee.

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 80] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7321

UNITED STATES OF AMERICA, Appellant,

vs.

GARLAND GREENWAY, Appellee

MOTION TO DISMISS—Filed January 10, 1957

To the Honorable United States Court of Appeals for the Fourth Circuit:

The Appellee, Garland Greenway, moves this Honorable Court to dismiss this appeal for that the Appellant, United States of America, has failed to file its brief twenty (20) days before the term to which this case is docketed for hearing, pursuant to Rule 12 of this Court.

Respectfully submitted, this 9th day of January, 1957.

Garland Greenway, Appellee, by Frank Banzet, His Attorney.

Frank Banzet, Court House Square, Warrenton, N. C., Attorney for Appellee.

[fol. 81] IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7321

FREDERICK L. TOEPLEMAN, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee,

and

UNITED STATES OF AMERICA, Appellant,

vs.

FREDERICK L. TOEPLEMAN and GARLAND GREENWAY, Appellees

Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh

ORDER DISMISSING APPEAL AS TO GARLAND GREENWAY—Filed and entered January 14, 1957

On consideration of the motion of Garland Greenway to dismiss the appeal of the United States of America as to him in the above entitled case, and counsel for the United States of America not objecting thereto:

It is now here ordered by this Court that the appeal of the United States of America as to Garland Greenway be, and the same is hereby dismissed.

January 14, 1957.

John J. Parker, Chief Judge, Fourth Circuit.

[fol. 82] MINUTE ENTRY OF ARGUMENT AND SUBMISSION—January 14, 1957 (omitted in printing)

[fols. 83-94] OPINION—Omitted. Printed side page 12 supra

[fol. 95] IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7321

FREDERICK L. TOEPLEMAN, Appellant and Cross-Appellee,

vs.

UNITED STATES OF AMERICA, Appellee and Cross-Appellant.

Cross-Appeals from the United States District Court for the Eastern District of North Carolina

JUDGMENT—Filed and Entered February 28, 1957

This cause came on to be heard on the record from the United States District Court for the Eastern District of North Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed in so far as it gives judgment against defendant and affirmed in so far as it denies recovery of damages under the statute; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of North Carolina, at Raleigh, for further proceedings in accordance with the opinion of the Court filed herein.

John J. Parker, Chief Judge, Fourth Circuit. Morris A. Soper, United States Circuit Judge. Albert V. Bryan, United States District Judge.

[fol. 96] April 2, 1957, mandate issued and transmitted to the Clerk of the United States District Court at Raleigh, North Carolina.

April 2, 1957, record on appeal and original exhibits returned to the Clerk of the United States District Court at Raleigh, North Carolina.

[fol. 97] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 98-99] IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7333

CATO BROTHERS, INCORPORATED, WILFRED R. CATO, WILLIAM R. CATO, and MAGIE L. DUNN (nee: Magie I. Stone), Appellants,

versus

UNITED STATES OF AMERICA, Appellee

Appendix to appellant's brief—Filed December 18, 1956

[fol. 100] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 1841

UNITED STATES OF AMERICA, Plaintiff

vs.

CATO BROTHERS, INC., WILFRED R. CATO, WILLIAM R. CATO, and MAGIE L. STONE, Defendants

COMPLAINT

1

This is a civil action brought by the United States of America as plaintiff under the provisions of Sections 3490 to 3492, inclusive, and Section 5438 of the Revised Statutes (31 U. S. C. 231-233) of which this court has jurisdiction under Section 3491 of the Revised Statutes, as amended (31 U. S. C. 232).

2

The defendant, Cato Brothers, Inc. is a corporation organized and existing under the laws of the State of Virginia, doing business in Emporia, Virginia, and whose stock is owned by Wilfred R. Cato, William R. Cato, and Magie L. Stone, all of whom are defendants herein, and Alfred Cato, who is not a defendant herein.

[fol. 101] 3

The defendant, Wilfred R. Cato, is a resident of Emporia, Virginia, within the jurisdiction of this court, and was at all times mentioned herein President and a Director of the defendant, Cato Brothers, Inc.

4

The defendant, William R. Cato, is a resident of Emporia, Virginia, within the jurisdiction of this court, and was at all times mentioned herein Secretary and a Director of the defendant, Cato Brothers, Inc.

5

The defendant, Magie L. Stone, is a resident of Emporia, Virginia, within the jurisdiction of this court, and was at all times mentioned herein Treasurer and a Director of the defendant, Cato Brothers, Inc.

6

None of the defendants is, nor at any time mentioned herein was, in the military or naval forces of the United States or in the militia called into or actually employed in the services of the United States.

7

Commodity Credit Corporation is an agency and instrumentality of the United States, the plaintiff herein, and all of the officers and employees of Commodity Credit Corporation are, and were at all times mentioned herein, persons in the civil service of the United States.

[fol. 102] 8

On July 23, 1948, Commodity Credit Corporation issued its 1948 Cotton Loan Instructions (13 F. R. 4338), a true and correct copy of which is annexed hereto, as a part hereof, marked "Plaintiff's Exhibit A", announcing a 1948 Cotton Loan Program under which loans would be made available to producers upon 1948 crop cotton which they had produced, as authorized and directed by Section 8 of the Stabilization Act o 1942, as amended (56 Stat. 767; 50

U. S. C., App. 968) and the Commodity Credit Corporation Charter Act (62 Stat. 1070; 15 U. S. C. 714).

9

Said 1948 Cotton Loan Instructions provided that loans on eligible cotton would be made available to eligible producers, defined an eligible producer as any person producing cotton in 1948 in the capacity of landowner, landlord, tenant, or sharecropper, and defined eligible cotton as cotton which, among other requirements, had been produced by the person tendering it for a loan. Said Instructions required a producer obtaining a loan on cotton to tender a duly executed 1948 Cotton Producer's Note and Loan Agreement (hereinafter referred to as a "Note"), a true and correct copy of a form of which is annexed hereto, as a part hereof, marked "Plaintiff's Exhibit B", listing the warehouse receipt numbers and description of the cotton and pledging the warehouse receipts representing the cotton as security for the loan.

10

Each Note contained the representations by the person executing the Note that he had produced the cotton, that he had the legal right to pledge the cotton as collateral se- [fol. 103] curity for the loan, that the benefits of the loan would accrue solely to him and any tenants or sharecroppers having an interest in the cotton or its proceeds, that the benefits of the loan had not been transferred to any other party by way of assignment, sale, or option, and that he was eligible for a loan on the cotton under the 1948 Cotton Loan Instructions.

11

On August 3, 1948, Commodity Credit Corporation and the defendant, Cato Brothers, Inc., entered into a Lending Agency Agreement, on CCC Cotton Form D, a true and correct copy of the form of which is annexed hereto, as a part hereof, marked "Plaintiff's Exhibit C", under which the defendant, Cato Brothers, Inc., was authorized to make loans to producers of 1948 crop cotton in accordance with the provisions thereof and said 1948 Cotton Loan Instructions, upon tender by the producers of warehouse receipts representing the cotton and duly executed Notes. Said

Lending Agency agreement further provided that Notes should be used by the defendant, Cato Brothers, Inc., only in making loans under said agreement; that the date on each Note *much* (sic) be the date on which the defendant, Cato Brothers, Inc., made disbursement of the loan proceeds to the producer; that said defendant should not make a loan on cotton pursuant to said agreement if, to said defendant's knowledge, the cotton tendered by the producer was ineligible for a loan under said 1948 Cotton Loan Instructions; that said defendant must not make any deduction for interest, commission, exchange, or other charges (except the authorized Clerk's fee) from the amount of any loan made pursuant to said agreement; that said defendant must tender all Notes evidencing loans made in accordance with said agreement to Commodity Credit Corporation, together with the warehouse receipts representing the cot- [fol. 104] ton listed on such Notes and duly executed Lending Agency's Letters of Transmittal; and that Commodity Credit Corporation would pay said defendant the face value of the Notes plus interest thereon at the rate of 1½ percent per annum from the date of such Notes to the date of payment by Commodity Credit Corporation.

12

During 1948 the defendants did enter into an agreement, combination, or conspiracy, and did agree, combine, and conspire to defraud the Government of the United States, or a department or officer therof, by obtaining or aiding to obtain the payment or allowance of false and fraudulent claims under said Lending Agency Agreement as herein set forth, to plaintiff's damage.

13

Between September 1, 1948, and November 30, 1948, the defendants induced various producers to sign numerous Notes in blank and listed on 288 of these Notes the warehouse receipt numbers and descriptions of bales of cotton owned by the defendant, Cato Brothers, Inc., which said defendant had purchased through its officers and employees from producers and other persons at less than the loan rates for such cotton under the 1948 Cotton Loan Program of Commodity Credit Corporation.

14

Between September 1, 1948, and November 30, 1948, in violation of the provisions of the Lending Agency Agreement referred to in paragraph 11 hereof, the defendants submitted said 288 Notes and the warehouse receipts representing the cotton listed on said Notes to Commodity Credit Corporation in the name of the defendant, Cato Brothers, [fol. 105] Inc. and thus made or caused to be made, or presented or caused to be presented, for payment or approval, to persons or officers in the civil service of the United States, 288 claims upon or against the Government of the United States, or a department or officer thereof, knowing such claims to be false, fictitious, or fraudulent, to plaintiff's damage.

15

The defendants retained the duplicate copies of the 288 Notes submitted to Commodity Credit Corporation.

16

Between September 1, 1948, and November 30, 1948, the defendants, for the purpose of obtaining or aiding to obtain the payment or approval of such claims, made, used, or caused to be made or used, false certificates, knowing the same to contain fraudulent or fictitious statements or entries in that each of the 288 Notes submitted to Commodity Credit Corporation contained the false certification that the person executing the Note had produced the cotton listed on the Note, that the benefits of the loan evidenced by the Note would accrue solely to him and any tenants or sharecroppers having an interest in the cotton or its proceeds, that the benefits of the loan had not been transferred to any other party by way of assignment, sale, or option, and that he was eligible for a loan on the cotton under said 1948 Cotton Loan Instructions.

17

Between September 1, 1948, and November 30, 1948, the defendants, for the purpose of obtaining or aiding to obtain the payment or approval of such claims, made, used, or caused to be made or used, false certificates, knowing the [fol. 106] same to contain fraudulent or fictitious statements or entries in that the defendant, Magie L. Stone,

acting as an official clerk appointed by the United States Department of Agriculture to assist producers in preparing loan documents, with the knowledge and consent of the other defendants herein, falsely certified on each of the Notes referred to in paragraph 13 that to the best of her knowledge and belief, all representations made by the producer executing the Note were true, complete, and correct, and that cotton listed on the Note was "eligible cotton," as defined in said 1948 Cotton Loan Instructions, and that she had delivered to the producer the duplicate copy of the Note.

18

During the period September 1, 1948, to November 30, 1948, the defendants, for the purpose of obtaining or aiding to obtain payment or approval of such claims, made, used, or caused to be made or used false certificates, knowing the same to contain fraudulent or fictitious statements or entries in that the defendant, Magie L. Stone, with the knowledge and consent of the other defendants herein and on behalf of defendant Cato Brothers, Inc., falsely certified in the "Payee's Certificate and Endorsement" on each of the Notes referred to in paragraph 13 hereof that she believed that the cotton listed on the Note was "eligible cotton," as defined in said 1948 Cotton Loan Instructions, and that the proceeds of the loan evidenced by the Note had been paid paid on the date shown on the Note and in the manner directed by the producer obtaining the loan.

19

Each of the false claims referred to in paragraph 14 hereof was approved by a person in the civil service of the United States, and plaintiff, acting through Commodity [fol. 107] Credit Corporation, paid to the defendant, Cato Brothers, Inc., the sum of $143,751.75, the face value of the 288 Notes plus 1½ percent interest to reimburse said defendant for the alleged use of its money in making loans to the producers who had signed such Notes, in the belief that such Notes represented loans which had been made by said defendant in accordance with the provisions of the Lending Agency Agreement referred to in paragraph 11 hereof, in reliance upon the certificates referred to in paragraphs 16, 17, and 18 hereof, and without knowledge

that such claims were false, fictitious, or fraudulent and that such certificates contained fraudulent or fictitious statements. The defendants thereby fraudulently obtained payments to which they were not entitled.

20

By reason of these premises and pursuant to the provisions of sections 3490 and 5438 of the Revised Statutes, each of the defendants became and is liable to forfeit and pay to the United States the sum of $2,000 for each of the 288 false claims referred to in paragraph 14 hereof, and, in addition, double the amount of damages which the United States sustained by reason of the acts complained of, together with interest and the costs of this suit.

Wherefore, plaintiff demands judgment against each of the defandants for the sum of $576,000 plus double the amount of damage this court shall find, together with interest and costs of this suit.

(S.) Lester S. Parsons, United States Attorney, (S.) James R. Moore, Assistant United States Attorney.

[fol. 108] IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION TO DISMISS

Defendants move that the complaint be dismissed upon the following grounds:

1. This court is without jurisdiction because the action has not been commenced within the period of time required by law.

2. The action is barred because not brought within the period of time required by law.

3. The complaint does not allege that plaintiff has been damaged.

4. 31 USCA § 231 does not provide or contemplate that a $2,000.00 forfeiture shall be paid for each separate note tendered. Thus an improper measure of and theory as to damages is stated by the complaint.

5. The complaint does not state a claim upon which relief can be granted.

Cato Bros., Incorporated, Wilfred R. Cato, William R. Cato, Magie S. Dunn, formerly Magie L. Stone, by Counsel.

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING WRITTEN AND VERBAL MOTIONS TO DISMISS AND PERMITTING PLAINTIFF TO AMEND COMPLAINT

On September 21, 1954, this cause came on to be heard on the defendants' motion to dismiss the complaint heretofore filed herein and on the defendants' motion made in open [fol. 109] Court that the complaint be dismissed for its failure to state the nature and extent of damages.

On consideration of which it is *Adjudged* and *Ordered* that the motion to dismiss heretofore filed be overruled and it is further *Adjudged* and *Ordered* that the verbal motion that the complaint be dismissed for its failure to state the nature and extent of damages be and the same is hereby overruled and the United States of America, plaintiff herein, is given leave to amend its complaint, so as to state the nature and extent of its actual damages, which amended complaint shall be filed on or before October 15, 1954.

(S.) Sterling Hutcheson, United States District Judge.

September —, 1954.

In United States District Court

Opinion of Court that Motion to Dismiss Should Be Overruled

September 23, 1954

A. C. Epps, Esquire
Mutual Building
Richmond, Virginia
L. S. Parsons, Jr., Esquire
United States Attorney
Richmond, Virginia

Gentlemen:

Re: United States v. Cato Brothers, Incorporated, Wilfred R. Cato, et al.—Richmond Civil #1841—

Upon further consideration of the defendants' motion to dismiss, it is my conclusion that the motion should be over-[fol. 110] ruled. Since the motion contains five separate grounds I feel that for the information of counsel I should give my views briefly with respect to each ground of the motion.

As to grounds 1 and 2, it is my view that the statute of limitations on the plaintiff's claim is six years. The pleadings show that the suit was instituted within six years from the time the cause of action accrued.

As to paragraph 3, as stated on yesterday, it is my view that the Government should be permitted to amend its complaint should it think an amendment necessary.

As to paragraph 4, I do not believe that this is a proper ground for dismissal. However, my ruling should not be taken as an expression on my part as to the merits of the contention made in this paragraph. I believe that this is a matter that can be disposed of in fixing damages should the plaintiff prevail in this case.

As to paragraph 5, I feel that the complaint is sufficient.

Very truly yours, (S.) Sterling Hutcheson, United States District Judge.

In United States District Court

Answer of All Defendants and Counterclaim of Cato Bros., Incorporated

Answer

1. Defendants deny that this court has jurisdiction of any claim of plaintiff by and through Commodity Credit Corporation pursuant to Title 31, Section 232 of the United States Code, but aver that jurisdiction of claims by and against plaintiff through the Commodity Credit Corpo- [fol. 111] ration arises under and only under Title 15, Sections 714 and 714a through o.

2. Defendants admit that Cato Bros., Incorporated is a corporation organized and existing under the laws of the State of Virginia, but aver that the name thereof is misstated in the complaint. Defendants deny that the stock is owned as set out in paragraph 2 of the complaint.

3. Paragraph 3 of the complaint is admitted.

4. Paragraph 4 of the complaint is admitted.

5. Defendant, Magie Stone Dunn, admits that her name was Magie L. Stone, that she is a resident of Emporia and that she was during the year 1948 treasurer of Cato Bros., Incorporated.

6. Paragraph 6 of the complaint is admitted.

7. Defendants neither admit nor deny the allegations of paragraph 7 of the complaint, none of them having any knowledge of the facts therein stated.

8. Defendants admit that Commodity Credit Corporation issued 1948 cotton loan instructions and refer to the instructions themselves for the terms and provisions thereof.

9. Defendants aver that the cotton loan instructions themselves contain the provisions thereof and reference is made thereto for the true and exact provisions thereof.

10. Defendants aver that the notes speak for themselves as to the provisions thereof.

11. Defendants admit entering into a lending agency agreement with Commodity Credit Corporation and aver that the terms of such agreement are the best evidence of the provisions thereof.

[fol. 112] 12. Defendants deny the allegations of paragraph 12 of the complaint and specifically and affirmatively

deny entering into any conspiracy or agreement to defraud plaintiff or a department or officer thereof and specifically and affirmatively deny making any efforts or conspiring to make efforts to obtain the payment or allowance of false and fraudulent claims. These defendants further deny that any of their actions damaged plaintiff in any way.

13. Defendants deny the allegations of paragraph 13 of the complaint.

14. Defendants admit that Cato Bros., Incorporated dealt during the period stated with Commodity Credit Corporation but they deny the making and presenting of any false or fraudulent claims. They further deny that plaintiff was damaged in any way as a result of their actions, or the actions of any one or more of defendants.

15. Defendants are not advised as of the truth or accuracy of the allegations contained in paragraph 15 of the complaint.

16. Defendants deny the allegations of paragraph 16 of the complaint and further specifically deny any intention of wrong doing or the doing of any wrongful acts.

17. Defendants admit that Magie L. Stone acted as an official clerk appointed by the United States Department of Agriculture but deny each and every other allegation of paragraph 17 of the complaint and deny any intention of obtaining or aiding to obtain the payment of false or fraudulent claims and any knowledge that any claims were false or fraudulent.

18. Defendants deny the allegations of paragraph 18 of the complaint.

[fol. 113] 19. Defendants admit, as set out above, that during the period in question, Cato Bros., Incorporated transacted business with Commodity Credit Corporation, but defendants deny each and every allegation of wrong doing. These defendants are not advised as to the status of any employees of the Commodity Credit Corporation.

20. Paragraph 20 of the complaint is denied. Defendants deny that they, or any one of them, is liable to forfeit and pay to the United States the sum of $2,000.00 for each of the alleged notes and that they or any one of them is liable for double the amount of damages sustained by plaintiff and that plaintiff is entitled to recover of them, or any

of them, interest or the costs of this suit as alleged in paragraph 20 of the complaint.

21. The measure of damages is improperly stated and plaintiff should be forced to amend to claim only one penal sum for the alleged error made in the 1948 cotton loan program, which sum said plaintiff is not entitled to recover of defendants, or any of them.

22. The complaint fails to state a claim against defendants, or any of them, upon which relief can be granted.

23. The court is without jurisdiction to hear the case because of the passage of time and plaintiff cannot prosecute its case because barred by the passage of time.

Wherefore defendants pray that judgment be entered for defendants in this action, with costs against the plaintiff.

Counterclaim of Cato Bros., Incorporated

24. Cato Bros., Incorporated states that plaintiff is indebted to it in the principal amount of Eleven hundred fifty dollars and twenty-four cents ($1150.24) together with in-
[fol. 114] terest thereon from January 1, 1953 by reason that said corporation contracted with the Production and Marketing Administration of the United States Department of Agriculture for the sale of eighty-eight hundred and forty-eight pounds of crimson clover seed which the said defendant has since that time withheld from payment and does now refuse to pay.

25. Whereupon Cato Bros., Incorporated moves for judgment against plaintiff for Eleven hundred fifty dollars and twenty-four cents ($1150.24) together with interest thereon and costs.

Cato Bros., Inc., Wilfred R. Cato, William R. Cato, Magie S. Dunn, formerly Magie L. Stone, by counsel.

IN UNITED STATES DISTRICT COURT

AMENDED COMPLAINT

Pursuant to leave of Court, the United States of America, as plaintiff herein, files its amended complaint as follows:

1

The allegations of paragraphs 1 through 20 of the original complaint filed herein are realleged verbatim and incorporated fully herein by reference.

2

A total of 859 bales of cotton was listed by the defendants on the aforedecribed notes and warehouse receipts and these 859 bales of ineligible cotton were sold by the Govern- [fol. 115] ment on April 8, 1953 at a net loss to the Government of $31,598.59.

3

The sum of $129.29 was received by the defendants as interest improperly charged by them while acting as lending agents for the Commodity Credit Corporation.

Wherefore, plaintiff demands judgment against each of the defendants for the sum of $576,000 plus double the sum of $31,598.59 representing the loss to the Government from the sale of the ineligible cotton and double the sum of $129.29 representing the amount of interest improperly charged by the defendants as the aforesaid lending agents.

(S.) L. S. Parsons, Jr., United States Attorney.

(S.) James R. Moore, Assistant United States Attorney.

IN UNITED STATES DISTRICT COURT

MOTION FOR LEAVE TO FILE AMENDED ANSWER

Defendants move the Court for leave to file an amendment to their answer, a copy of which is hereto attached, in

the interest of justice, so that all issues between the parties may be fully litigated in this action.

Cato Bros., Incorporated, Wilfred R. Cato, William R. Cato, Magie S. Dunn, formerly Magie L. Stone, by Counsel.

[fol. 116] IN UNITED STATES DISTRICT COURT

ORDER GRANTING LEAVING TO FILE AMENDED ANSWER —October 19, 1955

This cause came on to be heard on October 19, 1955, on defendants' motion for leave to file an amendment to their answer, and if appearing that justice requires that such leave be given, and the Court being fully advised,

It is Ordered:

1. That defendants be given leave to file their amendment to their answer.

2. That plaintiff reply or otherwise move with respect to the said amended answer within 21 days after service thereof.

(S) Sterling Hutcheson, United States District Judge

IN UNITED STATES DISTRICT COURT

DEFENDANT'S AMENDMENT TO ANSWER

Pursuant to leave granted by order of this Court on October 19, 1955, the defendants amend their answer as follows:

1. Add to paragraph No. the following subparagraphs:

"(a) The defendants have not committed or conspired to commit any of the acts prohibited by Section 5438 of the Revised Statutes of 1878; therefore, no recovery may be had by the plaintiff under Section 3490 of the Revised Statutes of 1878.

"(b) The plaintiff may recover only its actual damages, since the contract between the defendants and the Com-

modity Credit Corporation provides for this as the exclu-
[fol. 117] sive civil remedy for the acts alleged to have been committed by the defendants."

Cato Bros., Incorporated, Wilfred R. Cato, William R. Cato, Magie S. Dunn, formerly Magie L. Stone, By Counsel.

IN UNITED STATES DISTRICT COURT

MOTION BY DEFENDANTS FOR SUMMARY JUDGMENT

Defendants, Cato Brothers, Inc., Wilfred R. Cato, William R. Cato, and Magie L. Stone, move for summary judgment in their behalf, pursuant to Rule 56 of the Federal Rules of Civil Procedure, based upon their amended answer filed herein.

Cato Brothers, Inc., Wilfred R. Cato, William R. Cato, Magie L. Stone, By Counsel.

IN UNITED STATES DISTRICT COURT

OPINION DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT—November 14, 1955

On motion for summary judgment the defendant claims that:

1. This action does not properly come under Section 3490 of the Revised Statutes, which incorporates by refer-
[fol. 118] ence Section 5438, because in this instance there is alleged fraud against a government-owned corporation and not against the government itself as the term implied in 1878, when the statute was incorporated..
2. This being a criminal statute it must be narrowly construed.
3. Pierce v. United States, 314 U. S., 306 (1941) supports this motion.

The legislative history of Section 5438 indicates that under a literal interpretation, a government corporation

would not be within the purview of the original statute as incorporated. The case of United States v. Strang, 254 U. S., 491 (1921) bears out this interpretation. This is based on the reasoning of a "definite interpretation" being given a criminal statute. However, in the case of United States, ex rel Marcus v. Hess, 317 U. S., 537 (1943) the Court held that Section 3490 was remedial and not criminal. The Court in this case held that Section 3490 applied to the representations made to the Public Works Administration, said representations being the basis for advancing money to the Public Works Administration (distributing source to the defendants). The Hess case overruled the Court of Appeals for the Third Circuit which held that Section 3490 did not apply because the defendant dealt with the Public Works Administration and not with the Government. The Court said that it is the source of the money that is controlling and not the distributing sponsor.

The Supreme Court in the Hess case (supra) having decided definitely that Section 3490 is remedial and not criminal, by its failure to mention the Pierce case (supra) indicates that there is a distinction between the Hess and the Pierce cases. It is inescapable that this distinction is whether the statute in question is criminal or remedial. The Pierce case states that Section 32 of the criminal code, [fol. 119] the statute in question, was criminal in nature and that the Tennessee Valley Authority did not come within the original meaning as of 1884, its date of origin. However, two years later the Hess case (supra) says that Section 3490 is remedial in nature, and arrives at a holding which is contrary to that of the Pierce case. Note, too, that even though the Pierce case was not mentioned, the same defense (as upheld in the Pierce case) was overruled by the Supreme Court.

Therefore upon consideration of the above I am of opinion that the Hess case (supra) is controlling and the motion for summary judgment should be denied.

(S) Sterling Hutcheson, United States District Judge.

IN UNITED STATES DISTRICT COURT

LETTER OPINION OF COURT

June 21, 1956

Honorable L. S. Parsons, Jr.
United States Attorney
Richmond, Virginia
Christian, Barton, Parker and Boyd, Esquires
Mutual Building

Richmond Civil No. 1841—

Gentlemen:

Re: United States v. Cato Brothers, Incorporated—
Richmond Civil No. 1841—

[fol. 120] Upon consideration of the record, argument and briefs of counsel, I have reached the following conclusions concerning the above captioned case:

1. All defendants named violated the provisions of the Commodity Credit Corporation Act by filing and causing to be filed with the corporation claims based upon notes covering cotton produced by others;

2. The liability of the defendants is joint and several;

3. The Government may not recover for any loss sustained in the sale of the cotton involved, because:

(a) The cotton was held by the Government for an unreasonably long period of time during which it could have been sold at a profit and loss avoided; and

(b) The Government failed to accept the offer of the defendants to repurchase the cotton at the price paid by the Government and thereby avoid a loss.

4. The liability of the defendants is $2,000.00 forfeiture for each violation of the Act.

5. The forfeitures for which the defendants are liable are $2,000.00 for each of the 31 letters transmitting notes signed by producers of the cotton.

6. The Court has no authority to mitigate or remit any part of the forfeitures provided by the Act.

7. Judgment should be entered in favor of the Government against the defendants jointly in the sum of $62,000.00.

See *United States, ex rel Marcus* v. *Hess,* 317 U. S., 537; *Rex Trailer Company* v. *United States,* 350 U. S., 148; and *United States* v. *Grammis,* 172 Fed. (2d), 507.

It has been my purpose to prepare and file a memorandum in lieu of findings of fact and conclusions of law. [fol. 121] However, due to some unanticipated matters, to do so would cause additional delay. Therefore counsel are requested to submit drafts of proposed findings of fact and conclusions of law, and judgment order, in accordance with the foregoing.

Very truly yours, (S) Sterling Hutcheson, United States District Judge.

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—July 31, 1956

The Court having heard the evidence in the above case finds as a fact:

1. The defendant, Cato Bros., Incorporated, is a corporation organized and existing under the laws of the State of Virginia doing business in Emporia, Virginia.

2. The defendant, Wilfred R. Cato, is a resident of Emporia, Virginia, and was at all times mentioned herein President and a Director of Cato Bros., Incorporated.

3. The Defendant, William R. Cato, is a resident of Emporia, Virginia, and was at all times mentioned herein Secretary and a Director of Cato Bros., Incorporated.

4. The defendant, Magie L. Dunn (Nee: Stone), is a resident of Emporia, Virginia, and was during the year 1948, Treasurer of Cato Bros., Incorporated.

5. None of the defendants mentioned herein is, nor at any time mentioned herein was, in the military or naval service of the United States or in the militia called into or actually employed in the service of the United States.

[fol. 122] 6. The Commodity Credit Corporation is a

body corporate whose entire capital stock is subscribed by the United States of America, and it is an agency and instrumentality of the United States.

7. On August 3, 1948, the Commodity Credit Corporation and the defendant, Cato Bros., Incorporated, entered into a Lending Agency Agreemnt, under which the defendant, Cato Bros., Incorporated, was authorized to make loans to producers of 1948 crop cotton in accordance with the provisions of the said agreement.

8. During the year 1948, the defendants, Cato Bros., Incorporated, Wilfred R. Cato, William R. Cato and Magie L. Dunn (Nee: Stone), did submit to the Commodity Credit Corporation, fifty-five (55) letters, transmitting a total of One Thousand One Hundred Seventy-Six (1,176) notes representing loans made pursuant to the Lending Agency Agreement.

9. The defendants, Cato Bros., Incorporated, Wilfred R. Cato, William R. Cato, and Magie L. Dunn (Nee: Stone), transmitted to the Commodity Credit Corporation in thirty (30) of the aforementioned letters of transmittal a total of Seven Hundred Forty-eight (748) notes, in each of which letters there was at least one note covering cotton not actually produced by the person who signed the note as producer, and thus made and caused to be presented for payment to persons in the civil service of the United States, thirty (30) claims upon the Commodity Credit Corporation knowing the said claims to be false.

10. The cotton represented by the aforesaid improper notes was held by the Commodity Credit Corporation for an unreasonably long time, during which time it could have disposed of the said cotton at a profit.

[fol. 123] 11. The Commodity Credit Corporation failed to accept the offer of the defendants to repurchase the cotton at the price paid for the cotton by the said Corporation.

12. The defendant, Cato Bros., Incorporated, contracted with the Production and Marketing Administration of the United States Department of Agriculture for the sale of Eight Thousand Eight Hundred Forty-eight (8,848) pounds of crimson clover seed, for which said defendants have not been paid, and as a result of which the United States of America is indebted to the defendant, Cato Bros., Incorporated, in the principal amount of One Thousand One Hun-

dred Fifty and 24/100 Dollars ($1,150.24) together with interest thereon from January 1, 1953, at 6% per annum.

The Court concludes as a matter of law:

1. The defendants, Cato Bros., Incorporated, Wilfred R. Cato, William R. Cato and Magie L. Dunn (Nee: Stone), violated the provisions of Section 3490 of the Revised Statutes of 1878, in that they made and caused to be presented for payment to persons in the civil service of the United States thirty (30) claims upon the United States, knowing the said claims to be false.

2. A claim upon the Commodity Credit Corporation is a claim upon the United States within the meaning of Section 3490 of the Revised Statutes of 1878.

3. The defendants, Cato Bros., Incorporated, Wilfred R. Cato, William R. Cato and Magie L. Dunn (Nee: Stone), are jointly and severally liable to the United States of America in the amount of a Two Thousand Dollar ($2,000.00) forfeiture for each of the aforementioned thirty (30) letters of transmittal submitted to the Commodity Credit Corporation.

[fol. 124] 4. The plaintiff has not suffered any legally recoverable damages due to the actions of the defendants.

5. The recovery by plaintiff of Sixty Thousand Dollars ($60,000.00) in forfeitures is Constitutional as a civil remedy, even though plaintiff has not suffered any legally recoverable damages due to the actions of the defendants.

6. The defendant, Cato Bros., Incorporated, is entitled to judgment against the plaintiff in the amount of One Thousand One Hundred Fifty and 24/100 Dollars ($1,150.24) with interest thereon from January 1, 1953 at 6% per annum.

(S) Sterling Hutcheson, United States District Judge.

IN UNITED STATES DISTRICT COURT

FINAL JUDGMENT ORDER—July 31, 1956

The above matter having come on for trial and the evidence having been heard and the Court having found the defendants, Cato Bros., Incorporated, Wilfred R. Cato,

William R. Cato, and Magie L. Dunn (nee: Magie L. Stone), guilty of filing false claims upon the United States of America in violation of Section 3490 of the Revised Statute of 1878, and the Court having found that the United States of America is indebted to Cato Bros., Incorporated, in the amount of $1,150.24 with interest thereon at 6% per annum from January 1, 1953;

It is accordingly *Adjudged, Ordered* and *Decreed* that the defendants pay to the United States of America the sum of $60,000 or $2,000 forfeiture on each of the 30 letters of transmittal mentioned in the Findings of Fact herein, [fol. 125] and

It is further *Adjudged, Ordered* and *Decreed* that the United States of America do pay to Cato Bros., Incorporated, the sum of $1,150.24 with interest thereon at the rate of 6% per annum from January 1, 1953.

(S) Sterling Hutcheson, United States District Judge.

[fol. 126] IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7333

CATO BROS., INCORPORATED, WILFRED R. CATO, WILLIAM R. CATO, and Magie L. Dunn (nee: Magie L. Stone), Appellants,

versus

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond

DOCKET ENTRIES

October 25, 1956, record on appeal filed and appeal docketed.

October 25, 1956, original exhibits received from the Clerk of the District Court.

October 27, 1956, appearance of A. C. Epps and Charles W. Laughlin entered for the appellants.

October 30, 1956, appearance of A. C. Epps entered for the appellants.

November 8, 1956, appearance of Melvin Richter and William W. Ross, Attorneys, Department of Justice, entered for the appellee.

December 18, 1956, brief and appendix for appellants filed.

January 7, 1957, stipulation as to appellee's brief filed.

January 7, 1957, brief for appellee filed.

January 9, 1957, stipulation as to reply brief filed.

January 10, 1957, reply brief for appellants filed.

January 14, 1957, motion of appellants to change time of argument filed.

[fol. 127] January 14, 1957, motion of appellants to change time of argument presented in open court and denied.

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—January 14, 1957. (Omitted in Printing)

[fols. 128-139] OPINION—Omitted. Printed side page 12 supra

[fol. 140] IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7333

CATO BROS., INCORPORATED, WILFRED R. CATO, WILLIAM R. CATO, and Magie L. Dunn (nee: Magie L. Stone), Appellants,

vs.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Eastern District of Virginia

JUDGMENT—Filed and Entered February 28, 1957

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed in so far as it gives judgment against defendants; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Virginia, at Richmond, for further proceedings in accordance with the opinion of the Court filed herein.

John J. Parker, Chief Judge, Fourth Circuit. Morris A. Soper, United States Circuit Judge. Albert V. Bryan, United States District Judge.

April 2, 1957, mandate issued and transmitted to the Clerk of the United States District Court at Richmond, [fol. 141] Virginia.

April 8, 1957, record on appeal and original exhibits returned to the Clerk of the United States District Court at Richmond, Virginia.

[fol. 142] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 143] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1957

No. 146

UNITED STATES OF AMERICA, Petitioner,

vs.

HOWARD A. MCNINCH, d/b/a THE HOME COMFORT CO.; ROSALIE MCNINCH and GARIS P. ZEIGLER, et al.

ORDER ALLOWING CERTIORARI—October 14, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted, and the case is transferred to the summary calendar.

And it is futher ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE 1957 450796 850

No. ~~1058~~ 146

In the Supreme Court of the United States

OCTOBER TERM, 1956

THE UNITED STATES, PETITIONER

v.

HOWARD A. MCNINCH, D/B/A THE HOME COMFORT CO., ROSALIE MCNINCH AND GARIS P. ZEIGLER; FREDERICK L. TOEPLEMAN; AND CATO BROS., INC., WILFRED R. CATO, WILLIAM R. CATO, AND MAGIE L. DUNN (NEE: MAGIE L. STONE)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
MELVIN RICHTER,
WILLIAM W. ROSS,
Attorneys,
Department of Justice, Washington 25, D. C.

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CITATIONS

Statutes—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. —

THE UNITED STATES, PETITIONER

v.

HOWARD A. MCNINCH, D/B/A THE HOME COMFORT CO., ROSALIE MCNINCH AND GARIS P. ZEIGLER; FREDERICK L. TOEPLEMAN; AND CATO BROS., INC., WILFRED R. CATO, WILLIAM R. CATO, AND MAGIE L. DUNN (NEE: MAGIE L. STONE)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fourth Circuit entered in the above cases on February 28, 1957.

OPINIONS BELOW

The opinion of the Court of Appeals in the cases (App. A, *infra*, pp. 19–28) is reported at 242 F. 2d 359. The opinion of the District Court for the Eastern District of South Carolina in *McNinch* (M. R. 9–13)[1] is

[1] Since each case came to the Court of Appeals from a different District Court, there is a separate record in each. For convenience, the records will be referred to as M. R. (*McNinch*); T. R. (*Toepleman*) and C. R. (*Cato*).

not reported. The opinion of the District Court for the Eastern District of North Carolina in *Tompleman* (T. R. 11–20) is reported at 141 F. Supp. 677. The opinion of the District Court for the Eastern District of Virginia in *Cato* (C. R. 1v–1x) is not reported.

JURISDICTION

The judgments of the Court of Appeals in all three cases were entered on February 28, 1957 (App. A, *infra*, pp. 29–31). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a claim against funds of Commodity Credit Corporation—a wholly-owned government corporation, operating within and as part of the Department of Agriculture, the funds of which are furnished and if necessary supplemented by Congress on an annual basis—is a "claim upon or against the Government of the United States, or any department or officer thereof" under the civil False Claims Act.

2. Whether a claim against the Federal Housing Administration—an unincorporated, quasi-independent, agency operating within the Housing and Home Finance Agency with funds appropriated by Congress—is a "claim upon or against the Government of the United States, or any department or officer thereof" under the civil False Claims Act.[2]

[2] If certiorari is granted, we wish to reserve the right to brief and argue, with respect to the *McVinch* portion of the case, the additional question whether a fraudulent claim for a government guarantee of an FHA home improvement loan constitutes a "claim against the United States", under the civil False Claims Act, prior to default on the loan and indemnification of

STATUTE INVOLVED

The civil False Claims Act (12 Stat. 696, 698, R. S. 3490, 5438, 31 U. S. C. 231) provides in relevant part:

> Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, * * * shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and

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the lender by FHA. See *United States* v. *Tieger*, 234 F. 2d 589 (C. A. 3), certiorari denied, 352 U. S. 941; *United States* v. *Cochran*, 235 F. 2d 131 (C. A. 5), certiorari denied, 352 U. S. 941.

such forfeiture and damages shall be sued for in the same suit.

STATEMENT

These actions were brought by the United States under the civil False Claims Act, *supra*, pp. 3–4, seeking recovery against each of the respondents for false claims made by them in the course of obtaining government loans or loan guarantees.

1. *The facts.* The pertinent facts in each case may be summarized as follows:

Cato. Respondents, a corporation and its three principal directors, officers and shareholders, were engaged in cotton ginning and warehousing in Emporia, Virginia (C. R. 1x). In August, 1948, the Commodity Credit Corporation entered into a Lending Agency Agreement with the corporation, Cato Bros., Inc., pursuant to the Stabilization Act of 1942 (56 Stat. 767) and the Commodity Credit Corporation Charter Act (62 Stat. 1070), authorizing Cato Bros., Inc., as agent, to make nonrecourse loans to producers of eligible 1948 cotton (C. R. 1y). The agreement and the applicable Department of Agriculture regulations (1948 Cotton Loan Instructions, 13 F. R. 4338) authorized the agent to receive from cotton producers executed Cotton Producer Notes, together with warehouse receipts covering cotton pledged as security for the loans (C. R. 1e). The cotton notes were to contain a certification by the maker of the notes that he had produced the cotton on which the loan was to be made (C. R. 1e). The agreement provided that the agent would disburse the face

amount of the notes, and transmit them to Commodity; Commodity would in turn repay the agent the amounts advanced by it plus a fee of 1½ per cent (C. R. 1–1g). The agreement required the agent, in transmitting the notes, to certify that the representations by the maker were true to the best of the agent's knowledge and belief, and that the cotton listed on the note was "eligible" cotton as defined in the 1948 Cotton Loan instructions (C. R. 1h).

Between September 1, 1948, and November 30, 1948, respondents induced various bona fide cotton producers to sign 284 cotton producer note forms in blank (C. R. 1g). Respondents listed on these forms the warehouse receipt numbers of cotton which they had purchased from various sources, but which had not been produced by the makers of the note (C. R. 1y). They completed the forms by certifying that the cotton had been produced by and was then owned by the notes' makers, and also made the required certification on each note that the above statements (purportedly made by the producers) were correct to the best of their knowledge and belief, and that the cotton was "eligible" (C. R. 1i). Respondents received payment on the fraudulent notes together with the 1½ per cent fee provided as compensation for the use of the money purportedly disbursed by them to the producers. Respondents, however, made no disbursements to the producers—the producers having no interest in the pledged cotton—but rather retained Commodity's payments (C. R. 1y). On the basis of these facts, the District Court found that respondents had made false claims within the civil False Claims

Act and entered judgment for the Government in the amount of $60,000.[3]

Toepleman. Respondent Toepleman and Garland Greenway were in partnership as cotton factors and warehousemen with offices in Henderson and Louisburg, North Carolina, during the cotton marketing year from July 1, 1948 through June 30, 1949. (T. R. 14). During this period, the Government's 1948 cotton support program was in effect. See *supra*, pp. 4–5.

Although not a cotton producer, Toepleman wished to obtain the benefits of the program's low-interest rate, nonrecourse loans, under which the Government assumed the risks of market fluctuation during the loan period. To this end, Toepleman obtained the signatures in blank of 14 bona fide cotton producers on 82 Cotton Producer's notes (T. R. 15). He then purchased 325 bales of cotton, listed them on the producers' notes, representing that the cotton thus listed had been produced by the notes' makers, and tendered the notes to Commodity-approved lending agencies for a Government loan (T. R. 15).

Accepting these representations at face value, the lending agencies disbursed the proceeds of the loans to Toepleman and in turn transmitted the notes to Commodity for reimbursement plus the additional 1½% fee (see *supra*, p. 5), all of which Commodity paid (T. R. 15–16). Subsequently, respondent repaid 39 of the notes and redeemed the cotton thereunder; 43 of the notes went unpaid at maturity and

[3] Since 284 fraudulent notes had been sent to Commodity in thirty letters of transmittal, the District Court found each letter of transmittal a claim under the Act (C. R. 1y).

the cotton securing the loans was sold in January 1955 at a loss to the Government of $6,733.97 (T. R. 16). The District Court, as in the *Cato* case, found that Toepleman had made false claims under the civil False Claims Act and awarded judgment for the United States (T. R. 18–21).[4]

McNinch. The Government's complaint alleges the following: Respondents were president, secretary, and a salesman of an unincorporated home construction business located in Columbia, South Carolina, who, from November 6, 1951 to January 10, 1953, presented to a Federal Housing Administration-approved lending institution eleven fraudulent FHA loan credit applications, for the purpose of obtaining FHA-insured home improvement loans (M. R. 9). The loans were sought on behalf of persons on whose homes respondents had contracted to make improvements, and were for the purpose of financing these improvements (M. R. 4–5). Each application was also accompanied by a fictitious credit report, and both the applications and the reports misrepresented the financial eligibility of the customers for the insured loans (M. R. 5). The lending institution, relying on the false applications and credit reports, made the loans as requested, and submitted them to FHA for insurance pursuant to

[4] The District Court held that each of the 82 notes constituted a separate claim under the Act. However, since it was also of the view that the actual damages suffered by the United States were not "by reason of the doing or committing such act [the false claim]", as required by the Act, but resulted from a drop in the market price of the cotton, the court directed the entry of judgment for $164,000, on the basis of the statutory sum of $2,000 for each false claim (T. R. 20–21).

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Title I of the National Housing Act.[5] The FHA acknowledged the loans for insurance and billed the lending institution for the premiums required by the Act. (M. R. 5.)

In dismissing the Government's complaint, the District Court held that the complaint did not set out a claim within the civil False Claims Act since there had been no default on the loans and hence no demand for reimbursement made on the United States (M. R. 10–13).[6]

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[5] Under Title I of the National Housing Act (12 U. S. C. 1701, *et seq.*), the Federal Housing Administrator was empowered, upon such terms and conditions as he might prescribe, to insure qualified lending institutions against losses sustained as a result of loans made by them for the purpose of financing alterations, repairs, and improvements upon or in connection with real property. FHA enters into an insurance contract undertaking to indemnify the lenders against loss sustained by them on loans reported for insurance to FHA up to an aggregate amount equal to ten per cent of the value of such loans. A borrower, who wishes to obtain an improvement loan, applies to the lending institution on an FHA form ("FHA Title I Credit Application (Property Improvement Loan)"). Responsibility for determining that the borrower is a reasonable credit risk rests with the lending institution, which is permitted to rely on statements of fact made by the borrower.

Within 31 days after the loan is made, the lender must report the details of the loan transaction to FHA on an FHA form provided for the purpose, and must provide FHA with a statement that the above requirements have been complied with. After the loan is made and the details of the transaction have been reported to FHA, that agency computes the insurance premium which will be due and payable by the lending institution, records the transaction on its official records, and acknowledges the loan for insurance. See 24 C. F. R. (Perm. Ed.) 201.1–201.13; and *United States* v. *Emory*, 314 U. S. 423, 430, 433.

[6] Prior to the institution of this proceeding, respondents McNinch and Zeigler were convicted of making, in violation

2. *The holdings below.* The Court of Appeals disposed of the three cases in a single opinion. In *Tocpleman* and *Cato*, the court reversed the judgments of the District Courts because, the false claims having been made against Commodity Credit Corporation, the civil False Claims Act was thought to be inapplicable: "[a] government corporation, even though acting as an agency of the government is not the government, nor is it a department or officer of the government" (App. A, *infra*, p. 25). In *McNinch*, the court affirmed the District Court's judgment of dismissal on the same reasoning, despite the fact that the false claims there involved were against the Federal Housing Administration, an unincorporated agency of the Government (App. A, *infra*, p. 28). As an alternative ground for affirmance in *McNinch*, the court held that "the obtaining of the guaranty of loan was not the making of a claim within the meaning of the statute. *United States* v. *Tieger*, 3 Cir., 234 F. 2d 589, cert. den., 352 U. S. 941; *United States* v. *Cochran*, 5 Cir., 235 F. 2d 131, cert. den., 352 U. S. 941" (App. A, *infra*, p. 28).

REASONS FOR GRANTING THE WRIT

1. The holdings below in *Cato* and *Tocpleman* that the civil False Claims Act is not applicable to false

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of 18 U. S. C. 1010, false statements for the purpose of obtaining FHA-insured loans.

Also, prior to this proceeding, McNinch repurchased all of the outstanding FHA-insured loans and mortgages and assigned them to the lending institution for collection, presumably in an attempt to avoid default on the loans and subsequent civil liability under the False Claims Act.

claims against a wholly-owned Government corporation such as Commodity Credit Corporation are in square conflict with *United States* v. *Rainwater*, C. A. 8, No. 15659, decided May 3, 1957, App. B, *infra*, pp. 32–42.

In *Rainwater*, as in *Cato*, the United States had filed suits under the civil False Claims Act on the basis of allegedly false representations made to Commodity for the purpose of obtaining non-recourse loans on cotton (App. B, *infra*, pp. 32–33). There, as in *Cato*, the applications to Commodity were by an authorized lending agency which had procured the signatures of bona fide cotton producers on blank cotton forms, and then employed those forms to obtain loans on ineligible cotton produced by other growers, plus interest payments for the alleged advance of its own money. In reversing the District Court's dismissal of the complaint, the Court of Appeals for the Eighth Circuit explicitly ruled that the False Claims Act applied to false claims against Commodity (App. B, *infra*, pp. 36–42). As support for its judgment, the Eighth Circuit relied primarily on the broad language of the Act; Commodity's undoubted standing as a part of the Government of the United States and an operating agency of the Department of Agriculture; and this Court's holding in *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, that the False Claims Act applies to any claim which reaches "government money," however situated. The court expressly evaluated the contrary rationale of the Fourth Circuit's opinion in the present cases and concluded that "We find ourselves in disagreement with the Fourth Circuit case

and must decline to follow it" (App. B, *infra*, p. 36).

In thus disagreeing with the holdings in *Cato* and *Toepleman*, the Eighth Circuit *a fortiori* rejected the Fourth Circuit's further ruling in *McNinch* that the civil False Claims Act is also inapplicable to the false claims against the Federal Housing Administration which is not a corporation but rather an unincorporated agency within the Federal Housing and Home Finance Agency.

2. None of the grounds on which the decision below is predicated can withstand analysis.

(*a*) As the Eighth Circuit concluded in *Rainwater*, the language of the False Claims Act, standing alone, is broad enough to include government corporations. While it is probable that the Act's drafters did not specifically contemplate claims against wholly-owned government corporations when the statute was enacted in 1863 (12 Stat. 696), since at that time such corporations were virtually unknown, the general terms "Government of the United States, or any department or officer thereof" were clearly designed as "open ended"—covering every part of the Federal Government and not limited to the then extant agencies. For, as its Senatorial sponsor broadly asserted, the object of the Act was to provide protection against those who would "cheat the United States." Cong. Globe, 37th Cong., 3rd Sess., 952; see *Marcus* v. *Hess*, *supra*, 317 U. S. 537, 544. And as the court below recognized, under the normal method of reading Federal legislation, the fact that federal corporations were almost non-existent when the Act was passed would

not mean that they are not now subject to its terms (App. A, *infra*, p. 27). See *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, 385.

Furthermore, this Court's decisions of the past few decades make it clear that government corporations may, in appropriate circumstances, be regarded as a direct and integral part of the Government. For example, the Court has held that the Reconstruction Finance Corporation, a government corporation comparable to Commodity, is the "Government of the United States" for purposes of a statute allowing counterclaims in the Court of Claims (*Cherry Cotton Mills* v. *United States*, 327 U. S. 536); that a national bank may pledge its assets to secure deposits of government corporations, despite the fact that the National Banking Act permits pledges only to secure deposits of "Treasury" funds (*Inland Waterways Corp.* v. *Young*, 309 U. S. 517); and that a federal corporation is a "department of the Government" under Section 2 of the Post Roads Act, and thus entitled to lower telegraph rates (*Emergency Fleet Corp.* v. *Western Union Telegraph Co.*, 275 U. S. 415). As was stated in the *Inland Waterways* case, *supra*, at 524:

> The true nature of these modern devices [government corporations] for carrying out governmental functions is recognized in other legal relations when realities become decisive. * * * The funds of these corporations are, for all practical purposes, Government funds; the losses, if losses there be, are the Government's losses.

Similarly, here, the realities are decisive. With respect to false claims, Commodity's funds were for all practical purposes those of the Government. As *Rainwater* points out, since "the ultimate sources of payment of the fraudulent claims was the federal treasury * * * there can be no distinction between a government corporation or the government itself being defrauded" (App. B, *infra*, p. 37).[7]

(*b*) Likewise without merit is another ground for the holding below: that the amendment of the criminal False Claims Act in 1918 (R. S. 5438, 40 Stat. 1015) expressly to cover any corporation in which the United States held stock reveals a congressional aim to exclude all such corporations from the civil Act (R. S. 3490), which at that time and since has contained the unamended language. See App. A, *infra*, pp. 27–28. The 1918 amendment was occasioned in part by doubts as to whether the criminal Act applied to claims against the Emergency Fleet Corporation, chartered in the District of Columbia in 1917 with a provision for private as well as government stock ownership. *United States* v. *Bowman*, 260 U. S. 94, 101–102. Before the era of wholly-owned, federally-

[7] In *Pierce* v. *United States*, 314 U. S. 306, relied on by the court below (App. A, *infra*, p. 25), this Court refused to apply a false impersonation statute to the Tennessee Valley Authority, where (1) Congress had omitted the statute in specifically enumerating in the TVA Act certain federal penal statutes applicable to TVA operations (48 Stat. 68); (2) the statute had been amended, after the indictment, to make it expressly applicable to Government corporations; and (3) the Court implied that a contrary result might obtain were it confronted with "fraud which interferes with the successful operation of the Government" (314 U. S. at 312–313).

incorporated instrumentalities, there could be legitimate doubt whether a state-incorporated hybrid entity, with partial private ownership, was the "Government of the United States" for the purposes of a statute imposing criminal penalties.[8] Since 1918, the mixed-ownership government corporation has evolved into a federally-incorporated, federally-owned, and entirely governmental entity, which is in reality a corporate shell—usually an operative part of an Executive Department—the principal purpose of which is to provide a convenient bookkeeping device or a method for waiving sovereign immunity in specific areas.

The structure of Commodity Credit Corporation points up this contrast. Under its statute (15 U. S. C. 714), Commodity is "an agency and instrumentality of the United States, within the Department of Agriculture." Its Board of Directors is subject to the supervision of the Secretary of Agriculture who serves as its chairman (15 U. S. C. 714g (a)). Its employees are departmental employees and subject to the various statutes relating to federal employees. In addition, Commodity's entire original capital of $100,000,000 was supplied by the United States. 15 U. S. C. 714e. The Secretary of the Treasury must make an annual appraisal of Commodity's net worth; if the net worth

[8] But see *United States* v. *Walter*, 263 U. S. 15 (per Holmes J.), sustaining the validity of the 1918 amendment to R. S. 5438, and at the same time holding another provision of the Criminal Code (punishing an attempt to "defraud the United States") applicable to the Fleet Corporation, since "the contemplated fraud upon the corporation if successful would have resulted directly in a pecuniary loss to the United States, and even more immediately would have impaired the efficiency of its very important instrument" (263 U. S. at 18).

is impaired, the Treasury makes it up; and if there is an excess, it is paid over to the Treasury. 15 U. S. C. 713a–1, 713a–2. Also, Commodity is authorized to borrow up to $14,500,000,000 on the credit of the United States, to carry out the programs delegated to it by the Congress. 15 U. S. C. (Supp. IV) 714b (i).

In these circumstances, there can be little doubt that, far from being a hybrid private-type corporation like that involved in the *Bowman* case, *supra*, Commodity is an integral part of the Government, created by Congress to discharge significant governmental functions. Commodity is indistinguishable from the Reconstruction Finance Corporation, involved in *Cherry Cotton Mills* v. *United States*, 327 U. S. 536, 539:

> * * * Its Directors are appointed by the President and confirmed by the Senate; its activities are all aimed at accomplishing a public purpose; all of its money comes from the Government; its profits, if any, go to the Government; its losses the Government must bear. That the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is, an agency selected by Government to accomplish purely governmental purposes. * * *

(*c*) Since the claims here were ultimately for government funds, the irrelevant fact that the disbursement was made through a government corporation does not affect the applicability of the civil False Claims Act. In *Marcus* v. *Hess*, 317 U. S. 537, where claims were made to local municipalities and school districts for moneys to be paid out of a joint bank account containing both federal and local funds, this

Court held the civil False Claims Act applicable (317 U. S. at 544):

> * * * These funds are as much in need of protection from fraudulent claims as any other federal money, and the statute does not make the extent of their safeguard dependent upon the bookeeping devices used for their distribution. * * * The fraud here could not have been any more of an effort to cheat the United States if there had been no state intermediary.

Contrary to the opinion below, the *Hess* case is highly relevant, for, as already shown, Commodity is merely a conduit for disbursing government funds—funds which need protection from fraudulent claims fully as much as the monies of the Public Works Administration involved in *Hess*. Indeed, as indicated in the Eighth Circuit's *Rainwater* opinion, since the claims in these cases were made directly to Commodity, rather than to a state intermediary, the applicability of the Act here would seem to present an *a fortiori* case. App. B, *infra*, p. 40. See also *United States v. Walter*, 263 U. S. at 18.[9]

[9] To bolster its argument, the court below also referred to the fact that subsequent legislation providing criminal penalties for defrauding particular government corporations did not include "civil penalties or forfeitures"; and that suit under the False Claims Act is brought in the name of the United States, not the corporation (App. A, *infra*, pp. 27–28). These seem to be make-weights. Since the Act has general applicability, its scope is not to be determined by Congressional action in providing specified criminal penalties for offenses against specific federal corporations. Further, Congress has specifically provided that suits on claims of Commodity may be brought in the name of the United States, as the real party in interest. 15 U. S. C. 744b (c). Cf. *United States* v. *Allied Oil Corp.*, 341 U. S. 1.

3. The court below compounded its error by holding in *McNinch* that the civil False Claims Act also does not cover claims against the Federal Housing Administration. While the FHA is suable in its own name (12 U. S. C. 1702) and is subject to the auditing requirements of the Government Corporation Control Act (31 U. S. C. 846), it is not a corporation in structure and has no capital, but operates with funds directly appropriated by Congress, like other non-incorporated agencies. 12 U. S. C. 1702–1706c, 1712. Thus, even if it be assumed that the Act is inapplicable to claims against government corporations, there is no reason why claims against FHA should not fall within the statute. In fact, FHA funds are indistinguishable in nature and source from those of the Public Works Administration involved in *Hess*; that agency was no more or less independent or distinct from the "Government" than is FHA.

4. The issues we present are important. The effect of the combined holdings below is to exclude from the coverage of the civil False Claims Act not only false claims against the forty federal entities listed in the Government Corporation Control Act (31 U. S. C. 846), but also those against several separate government agencies irrespective of whether they are a part of one of the Executive Departments, or not. Since Congress has in recent years selected corporations or independent agencies to carry out a substantial part of the Government's activities and programs, the clear result of the rulings is to deprive the Government of its only civil protection against fraudulent claims in a wide and significant area.

To illustrate the impact of these holdings, we refer to advice which we have received that over 7,000,000 distinct claims, in an estimated amount of nearly five billion dollars, are annually filed against Commodity Credit Corporation. In addition, there are approximately 265 cases now pending in the Department of Justice or before the various District Courts in most, if not all, circuits, involving 7,900 allegedly false claims against Commodity, totaling over $4,000,000 in ascertainable damages alone. The comparable figures for the Federal Housing Administration are of roughly the same order.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,
Solicitor General.
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MELVIN RICHTER,
WILLIAM W. ROSS,
Attorneys.

MAY 1957.

APPENDIX A

United States Court of Appeals for the Fourth Circuit

No. 7224

UNITED STATES OF AMERICA, APPELLANT

v.

HOWARD A. MCNINCH, D/B/A THE HOME COMFORT COMPANY, ROSALIE MCNINCH AND GARIS P. ZEIGLER, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, AT COLUMBIA

(Argued October 4, 1956. Decided February 28, 1957.)

No. 7321

FREDERICK L. TOEPLEMAN, APPELLANT AND CROSS-APPELLEE

v.

UNITED STATES OF AMERICA, APPELLEE AND CROSS-APPELLANT

CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, AT RALEIGH

No. 7333

CATO BROS., INCORPORATED, WILFRED R. CATO, WILLIAM R. CATO, AND MAGGIE L. DUNN (NEE: MAGIE L. STONE), APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND

(Argued January 14, 1957. Decided February 28, 1957.)

Before PARKER, *Chief Judge;* SOPER, *Circuit Judge,* and BRYAN, *District Judge*

PARKER, *Chief Judge:*

These are appeals from judgments in actions instituted under the Federal False Claims Act, R. S. 3490, 5438, 31 U. S. C. 231. In No. 7224 the action was grounded on false representations made in obtaining the guaranty by the Federal Housing Administration of loans made to defendants by a bank. Judgment was entered for defendants and the United States has appealed. See *United States* v. *McNinch,* 138 F. Supp. 711. In the other two cases, action was grounded on false representations made to the Commodity Credit Corporation for the purpose of obtaining loans on cotton. Judgment was entered in favor of the United States for the $2,000 forfeiture provided by statute as to a number of transactions and the defendants have appealed. The cases are considered together, as the controlling question in all of them is the applicability of the False Claims Act to claims against government corporations as distinguished from claims against the government itself or "any department or officer thereof."

In No. 7224 the facts are that two of the defendants were officers and one a salesman of an unincorporated home construction business. They presented to a bank, which was an approved FHA lending institution, eleven fraudulent FHA loan applications for the purpose of obtaining FHA-insured home improvement loans in behalf of home-owner customers with whom they had contracted to carry out home improve-

ments. The bank made the loans, which were then insured by the FHA pursuant to Title I of the National Housing Act. Prior to the institution of this proceeding, two of the defendants pleaded guilty to violating 18 U. S. C. 1010, which prohibits the making of false statements for the purpose of obtaining FHA-insured loans.

In No. 7321 the facts are that defendants were engaged in the cotton business. Desiring to obtain nonrecourse loans on cotton which they purchased in the course of their business, they caused eighty-two producers' notes and loan agreements to be signed by producers of cotton and used them to obtain loans under the Cotton Loan Program from the Commodity Credit Corporation, pledging as security cotton belonging, not to the producers who signed the notes, but to the defendants. The holding of the court was that each note constituted a false claim under the statute and judgment was entered against the defendant Toepleman for the sum of $2,000 as to each note, or a total of $164,000, subject to a credit of $2,000. Defendant Toepleman paid 39 of the notes and redeemed the cotton thereunder. The remaining 43 notes were not paid on maturity and the cotton pledged to secure same was sold by the government at a loss of $6,733.97. Toepleman appealed from the judgment for $162,000 and the United States filed a cross appeal from the refusal of the judge to render judgment for double the amount of the $6,733.97 loss sustained on the sale of the cotton.

In No. 7333, the facts are that the defendants obtained loans on cotton from the Commodity Credit Corporation in 30 separate transactions embracing notes which contained the false representation that they were made by the producers of the cotton. Judgment was rendered against the defendants for $60,000,

representing a forfeiture of $2,000 as to each transaction; and from this portion of the judgment defendants have appealed. Judgment was rendered in favor of defendants for $1,150.24 on a counterclaim relating to an entirely different matter, and from this portion of the judgment no appeal was taken.

The important question presented by all of the appeals is whether the forfeiture of $2,000 imposed by the False Claims Act applies where the claims are made, not directly against the government or against "any department or officer" of the government, but against a corporation as a governmental agency. We think that, in the light of the language used in the statute, as well as in the light of legislative history, this question must be answered in the negative.

The authoritative text of the False Claims Act is to be found in Section 3490 of the Revised Statutes of 1878, which is as follows:

> SEC. 3490. Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the services of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title "Crimes," shall forfeit and pay to the United States the sum of Two Thousand Dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

This section has never been amended, although R. S. 5438 has been amended. Prior to the amendment of R. S. 5438, the pertinent portion of that section, incorporated by reference in R. S. 3490, was as follows:

> SEC. 5438. Every person who makes or causes to be made, or presents or causes to be pre-

> sented, for payment or approval, to or by any person or officer in the civil, military, or naval services of the United States, any claim *upon or against the Government of the United States, or any department or officer thereof,* knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of *such claim,* makes, uses or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the *Government of the United States or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim,* * * * shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars. [Italics' supplied.]

In 1918, section 5438, then appearing as section 35 of the Criminal Code was amended by adding to the list of those to whom it was made criminal to present a false claim "any corporation in which the United States of America is a stockholder". Like language was added to the description of the claim. 40 Stat. 1015. The purpose of the amendment was to extend the criminal provision of the section so as to protect government corporations, i. e. corporations in which the government was a stockholder and in reality the owner of the corporate business and property. See *United States* v. *Bowman*, 260 U. S. 94 and H. R. Report No. 668, 65th Cong. 2d Sess. and 56 Cong. Rec. pp. 11, 118–11, 119. The section as amended was carried forward and reenacted as section 287 of Title 18 of the United States Code, making it a crime to present a false claim against "The United States, or any

department or *agency* thereof." [Italics supplied.] This language, of course, makes the criminal statute applicable to false claims against government corporations, since "agency" is defined in 18 U. S. C. 6 as including "any corporation in which the United States has a proprietary interest."

There has been no amendment of the civil provisions contained in R. S. 3490, extending their coverage to false claims against government corporations; and it is well settled that the incorporation of the terms of a statute by reference does not incorporate subsequent amendments of that statute. See *Kendall* v. *United States,* 12 Peters 524, 625; *In re Heath,* 144 U. S. 92; *Hassett* v. *Welch,* 303 U. S. 303, 314. This has been held expressly with respect to the incorporation by R. S. 3490 of the provisions of R. S. 5438. *United States ex rel. Kessler* v. *Mercur Corporation,* 2 Cir. 83 F. 2d 178, 180, cert. den., 299 U. S. 576. In the case cited, the Court of Appeals of the Second Circuit, speaking through Judge Augustus N. Hand, said:

> While section 5438 was amended, repealed, and finally since the time when it was referred to in section 3490 superseded by a broader enactment (18 U. S. C. A. 80), it stands, so far as section 3490 is concerned, as it was written when incorporated by reference. It is quite immaterial that the superseding act alone appears in the United States Code, for the Code only embodies a prima facie statement of the statutory law. It is well settled that where a statute incorporates another, and the one incorporated is thereafter amended or repealed, the scope of the incorporating statute remains intact and "no subsequent legislation has ever been supposed to affect it." *Kendall* v. *United States,* 12 Pet. 524, 625, 9 L. Ed. 1181; *In re Heath,* 144 U. S. 92, 93, 94, 12 S. Ct. 615, 36 L. Ed. 358.

See also *United States* v. *McMurtry* (W. D. Ky.), 5 F. Supp. 515, and *Olson* v. *Mellon* (W. D. Pa.), 4 F. Supp. 947, adopted as opinion of Court of Appeals of Third Circuit 71 F. 2d 1021.

The question, then, is narrowed to this: Is a claim against a government corporation, which acts as an agency of the government, a claim against the government of the United States or a department or officer thereof as required by R. S. 5438 as a condition of liability at the time of the adoption of R. S. 3490? The answer is manifestly that it is not such a claim. A government corporation, even though acting as an agency of the government is not the government, nor is it a department or officer of the government. As said by Judge Patterson in *United States ex rel. Meyer Salzman* v. *Salant & Salant*, 41 F. Supp. 196, 197: "a corporation which is an agency of the government is not the government or a department or officer of it." See also *Pierce* v. *United States*, 314 U. S. 306 and *Lindgren* v. *United States Shipping Board Merchant Fleet Corporation*, 55 F. 2d 117, 120, cert. den., 286 U. S. 542. In the case last cited this court said:

> Plaintiff contends, however, that this suit and the former suit are virtually against the same defendant because the United States owns the stock of the Fleet Corporation and the Fleet Corporation is an agency of the United States. This position cannot be sustained. The United States is a sovereign power representing in its corporate capacity the people of the country and immune from suit, except as it may give its consent thereto. The Fleet Corporation is a private corporation of the District of Columbia, created under the laws of the United States, with power to sue and be sued in the same manner as other corporations. *Sloan Shipyards*

> *Corp.* v. *U. S. Shipping Board Emergency Fleet Corporation*, 258 U. S. 549, 568, 42 S. Ct. 386, 66 L. Ed. 762; *U. S. Shipping Board Merchant Fleet Corporation* v. *Harwood*, 281 U. S. 519, 526, 50 S. Ct. 372, 74 L. Ed. 1011. Although the United States owns its stock, it is a distinct entity just as other corporations are distinct from their stockholders. A suit against it is not a suit against the United States, and a suit against the United States is not a suit against it.

There is nothing to the contrary in *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537. The fraud there was perpetrated not against a government corporation but against the government itself, the decision being that R. S. 5438 covered the case of one who knowingly caused the government to pay claims grounded in fraud. The gist of the decision is contained in the following quotation, viz:

> While payment itself, in the sense of the direct transferring of checks, was done in the name of local authorities, monthly estimates for payment were submitted by the respondents to the local sponsors on P. W. A. forms which showed the government's participation in the work and called attention to other federal statutes prohibiting fraudulent claims. It was a prerequisite to respondents' payment by the local sponsors that these estimates be filed, transmitted to, and approved by, the P. W. A. authorities. *Payment was then made from a joint construction bank account containing both federal and local funds.* The work was done under constant federal supervision.
>
> *The government's money* would never have been placed in the joint fund for payment to respondents had its agents known the bids were collusive. By their conduct, the respondents

> thus caused *the government to pay* claims of the local sponsors in order that they might in turn pay respondents under contracts found to have been executed as the result of the fraudulent bidding. This fraud did not spend itself with the execution of the contract. Its taint entered into every swollen estimate which was the basic cause for payment of every dollar paid by the P. W. A. into the joint fund for the benefit of respondents. The initial fraudulent action and every step thereafter taken pressed ever to the ultimate goal—payment of government money to persons who had caused it to be defrauded. [Italics supplied.]

The fact that the government corporations here involved were not in existence at the time of the enactment of R. S. 5438 would not be controlling if the language of the section were broad enough to encompass claims against such corporations; but, as we have seen, the language is not broad enough to cover such claims, however liberal an interpretation be placed upon it. And in this connection we are bound to give consideration to the fact that the language of R. S. 3490 was not amended to cover such claims when amendments were made in the language of R. S. 5438 to cover the making of fraudulent claims against government corporations. Not only is this true, but it is true also that, in subsequent legislation passed to protect government corporations against false and fraudulent claims, criminal penalties were specifically provided but no provision was made for civil penalties or forfeitures. See 18 U. S. C. 1010 and 1014. If it were the intent of Congress that presentation of false claims against such corporations be redressed by actions for civil penalties or forfeitures, it would have been easy enough to have so provided when the stat-

utes were enacted providing the criminal penalties.* Such action by Congress would certainly be more logical and seemly than for the courts to give a forced interpretation to a statute passed three quarters of a century ago when government corporations had not been dreamed of.

Another ground for holding the statute not applicable in case No. 7224 is that the obtaining of the guaranty of loan was not the making of a claim within the meaning of the statute. *United States* v. *Tieger*, 3 Cir. 234 F. 2d 589, cert. den., 352 U. S. 941; *United States* v. *Cochran*, 5 Cir. 275 F. 2d 131, cert. den., 352 U. S. 941.

For the reasons stated, the decision in No. 7224 will be affirmed, the decision in No. 7321 will be reversed in so far as it gives judgment against defendants and affirmed in so far as it denies recovery of damages under the statute, and the decision in No. 7333 will be reversed in so far as it gives judgment against defendants.

No. 7224, *Affirmed.*

No. 7321, *Reversed in Part and Affirmed in Part.*

No. 7333, *Reversed in Part.*

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*In such case, civil penalties would properly have been made recoverable by the corporation, not by the United States. The fact that the forfeiture under R. S. 3490 must be recovered in a suit by the United States, and not by the government corporation to which the false claim has been presented, is an additional argument that false claims against such corporations are not comprehended by the statute.

No. 7224

United States Court of Appeals for the Fourth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

HOWARD A. MCNINCH, D/B/A THE HOME COMFORT COMPANY, ROSALIE MCNINCH AND GARIS P. ZEIGLER, APPELLEES

Judgment

Filed and Entered February 28, 1957

Appeal from the United States District Court for the Eastern District of South Carolina.

This cause came on to be heard on the record from the United States District Court for the Eastern District of South Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.

MORRIS A. SOPER,
United States Circuit Judge.

ALBERT V. BRYAN,
United States District Judge.

No. 7321

United States Court of Appeals for the Fourth Circuit

FREDERICK L. TOEPLEMAN, APPELLANT AND CROSS-APPELLEE

v.

UNITED STATES OF AMERICA, APPELLEE AND CROSS-APPELLANT

Judgment

Filed and Entered February 28, 1957

CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

This cause came on to be heard on the record from the United States District Court for the Eastern District of North Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed in so far as it gives judgment against defendant and affirmed in so far as it denies recovery of damages under the statute; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of North Carolina, at Raleigh, for further proceedings in accordance with the opinion of the Court filed herein.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.

MORRIS A. SOPER,
United States Circuit Judge.

ALBERT V. BRYAN,
United States District Judge.

No. 7333

United States Court of Appeals for the Fourth Circuit

CATO BROS., INCORPORATED, WILFRED R. CATO, WILLIAM R. CATO, AND MAGIE L. DUNN (NEE: MAGIE L. STONE), APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

Judgment

Filed and Entered February 28, 1957

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed in so far as it gives judgment against defendants; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Virginia, at Richmond, for further proceedings in accordance with the opinion of the Court filed herein.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.

MORRIS A. SOPER,
United States Circuit Judge.

ALBERT V. BRYAN,
United States District Judge.

APPENDIX B

United States Court of Appeals for the Eighth Circuit

No. 15659

UNITED STATES OF AMERICA, APPELLANT

v.

R. S. RAINWATER, SR., SLOAN RAINWATER, JR., WILLIAM RAINWATER AS INDIVIDUALS AND AS PARTNERS, D/B/A R. S. RAINWATER & SONS, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

No. 15660

UNITED STATES OF AMERICA, APPELLANT

v.

CITIZENS NATIONAL BANK, WALNUT RIDGE, ARKANSAS, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

May 3, 1957

Before WOODROUGH, VOGEL and VAN OOSTERHOUT, *Circuit Judges*

VOGEL, *Circuit Judge.*

The United States brought two separate actions under the Federal False Claims Act, §§ 3490–3492 and § 5438 of the Revised Statutes, 31 U. S. C. A.

§§ 231–233. Both actions were based on alleged false representations made to the Commodity Credit Corporation for the purpose of obtaining loans on cotton. The cases were consolidated and will be treated jointly. Subsequent to the consolidation the defendants made motions to dismiss on two grounds: 1, Lack of jurisdiction of the subject matter; 2, failure to state a claim upon which relief could be granted. Without writing an opinion setting forth its reasons, the District Court granted dismissal and the government brings these appeals.

The briefs and arguments of counsel are confined to two propositions: One, do false claims submitted to wholly owned government corporations, such as Commodity Credit Corporation, come within the purview of the False Claims Act as claims "against the Government of the United States, or any department or officer thereof"? Two, do the complaints state facts upon which relief may be granted where there has been no specific allegation of damage?

The second question requires no prolonged discussion. The complaints, after setting forth in detail the manner in which the defendants procured the "payment and allowance of false and fraudulent claims," (loans on cotton) pray for judgment "for the amounts provided for in 31 U. S. C. 231." 31 U. S. C. A. § 231, being the False Claims Act under which the actions were commenced, provides that the persons doing any of the prohibited acts "shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages." Accordingly, it cannot be said, as claimed by the defendants, that there was no allegation of damage. Certainly by inference, at least, the government asks that in addition to the sum of $2,000.00 it recover double the amount of its damages. Irrespective of that, we believe that even if

no damages were shown at the time of trial the United States could still recover the statutorily fixed sum of $2,000.00 for each of the proscribed acts. *United States* v. *Rohleder*, 1946, 3 Cir., 157 F. 2d 126, 129; *United States ex rel. Marcus* v. *Hess*, D. C. Pa., 1941, 41 F. Supp. 197, aff'd., 317 U. S. 537. We hold that defendants' second point or contention is unsound.

It is with the first proposition that difficulty arises. The False Claims Act, § 3490 of the Revised Statutes, was passed in 1863:

> SECTION 3490. Any person * * * who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundren and thirty-eight, Title "Crimes," shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same ~~suit.~~

The foregoing § 3490 has never been amended, but R. S. 5438, the criminal section referred to therein, has been amended. Prior to the amendment of R. S. 5438 it, insofar as may be pertinent herein, was as follows:

> SECTION 5438. Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, *any claim upon or against the Government of the United States, or any department or officer thereof*, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposi-

> tion, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fradulent claim * * * shall be imprisoned * * *. [Emphasis supplied.]

While § 5438 was subsequently amended to include "any corporation in which the United States of America is a stockholder", it is well established that subsequent alteration or repeal of a statute previously incorporated by reference in a second statute does not affect the incorporating statute. *United States ex rel. Kessler* v. *Mercur Corp.*, 2 Cir., 1938, 83 F. 2d 178, 180:

> While section 5438 was amended, repealed, and finally since the time when it was referred to in section 3490 superseded by a broader enactment (18 U. S. C. A. § 80), it stands, so far as section 3490 is concerned, as it was written when incorporated by reference. * * * It is well settled that where a statute incorporates another, and the one incorporated is thereafter amended or repealed, the scope of the incorporating statute remains intact and "no subsequent legislation has ever been supposed to affect it." *Kendall* v. *United States*, 12 Pet. 524, 625, 9 L. Ed. 1181; *In re Heath*, 144 U. S. 92, 93, 94, 12 S. Ct. 615, 36 L. Ed. 358.

Succinctly stated, then, our question is: Do false claims submited to the Commodity Credit Corporation, a wholly owned government corporation, come within the meaning of the Federal False Claims Act as being "upon or against the Government of the United States, or any department or officer thereof"?

In a very recent case, *United States* v. *McNinch; et al.*, decided February 28, 1957, — F. 2d —, the Court of Appeals for the Fourth Circuit held that a claim against a government corporation which acts as an agency of the government is not a claim against the government of the United States or a department or officer thereof, "* * *" as required by R. S. 5438 as a condition of liability at the time of the adoption of R. S. 3490." It held that the language of the statute was not broad enough to cover such claims. The court gave consideration to the fact that the language of R. S. 3490 was not amended when amendments were made in the language of R. S. 5438 (the criminal statute) to cover the making of false claims against corporations in which the government was a stockholder. It stated, at page 11:

> If it were the intent of Congress that presentation of false claims against such corporations be redressed by actions for civil penalties or forfeitures, it would have been easy enough to have so provided when the statutes were enacted providing the criminal penalties. Such action by Congress would certainly be more logical and seemly than for the courts to give a forced interpretation to a statute passed three quarters of a century ago when government corporations had not been dreamed of.

We find ourselves in disagreement with the Fourth Circuit case and must decline to follow it. Until *United States* v. *McNinch,* no case had so held. (*United States ex rel. Salzman* v. *Salant & Salant, Inc.,* D. C. N. Y., 1938, 41 F. Supp. 196, cited by the appellees is not in point as it involves the Red Cross, whose funds are in no sense the property of the United States.) In addition to the cases reversed by *McNinch*, the District Court for the Southern District of New York, in *United States* v. *Samuel Dunkel &*

Co., Inc., D. C. N. Y., 1945, 61 F. Supp. 697, 699, in dealing with alleged frauds in connection with the sale of dried eggs to the Federal Surplus Commodities Corporation, held:

> The obvious purpose and intent of this statute (Section 231 of Title 31, U. S. C. A., R. S. § 3490 and 5438) was to reach any person who knowingly caused or assisted in causing the Government to pay claims which were grounded in fraud, without regard to whether the person had direct contractual relations with the Government, as well as those who receive money from the Government as the result of their fraud. There is not to be so strict a construction as urged by the defendants.

We rely mainly, however, upon *United States ex rel. Marcus* v. *Hess*, 1943, 317 U. S. 537 (cited in the *Samuel Dunkel* case). In doing so, we shall attempt to point out that the ultimate source of payment of the fraudulent claims was the federal treasury and when so viewed there can be no distinction between a government corporation or the government itself being defrauded. In *Marcus* v. *Hess, supra,* the Supreme Court was dealing with the same acts with which we are here concerned. There the respondents had made claims with local governmental units rather than with the United States government, but a substantial portion of their pay came from the United States for work on PWA projects. The court stated, at page 542:

> We think the conduct of these respondents comes well within the prohibition of the statute, which includes "every person who * * * causes to be presented, for payment * * * any claim upon or against the Government of the United States * * * knowing such claim to be * * * fraudulent." This can best be seen upon consideration of the exact nature of respondents' relation to the government. *The contracts*

> *found to have been induced by the respondents' frauds were made between them and local municipalities and school districts of Allegheny County, Pennsylvania. A large portion of the money paid the respondents under these contracts was federal in origin,* granted by the Federal Public Works Administrator, an official of the United States. 40 U. S. C. 401 (a). [Emphasis supplied.]

Here, *all* of the money paid defendants was "federal in origin". In fact, we do not believe it ever lost federal identity. In reversing the Circuit Court in *Marcus* v. *Hess,* the Supreme Court stated, at page 544:

> Government money is as truly expended whether by checks drawn directly against the Treasury to the ultimate recipient or by grants in aid to states. While at the time of the passage of the original 1863 Act, federal aid to states consisted primarily of land grants, in subsequent years the state aid program has grown so that in 1941 approximately 10% of all federal money was distributed in this form. These funds are as much in need of protection from fraudulent claims as any other federal money and the statute does not make the extent of their safeguard dependent upon the bookkeeping devices used for their distribution. The Senatorial sponsor of this bill broadly asserted that its object was to provide protection against those who would "cheat the United States." The fraud here could not have been any more of an effort to cheat the United States if there had been no state intermediary.

The same is true here except instead of a "state intermediary" we have a wholly owned government corporation set up as a "bookkeeping device" for the handling of government money. After quoting portions of the statute, the Supreme Court continued:

> These provisions, considered together, indicate a purpose to reach any person who know-

ingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government.

The Commodity Credit Corporation is actually an instrumentality of the United States "within the Department of Agriculture". (15 U. S. C. A. § 714) Its entire original capital of $100,000,000.00 was supplied by the United States. 15 U. S. C. A. § 714e. The Secretary of the Treasury must make an annual appraisal of the net worth of Commodity Credit Corporation and if the net worth is less than $100,000,000.00 the treasury must restore the amount of capital impairment. 15 U. S. C. A. § 713a–1. If the appraisal indicates an excess, the treasury receives such excess. 15 U. S. C. A. § 713a–2. Commodity Credit Corporation is authorized to borrow up to $14,500,000,000.00 on the credit of the United States to carry out its statutory programs of making loans on agricultural commodities. 15 U. S. C. A. § 713a–4. It seems to us, then, that both as a matter of form and as a matter of substance the alleged false claims were claims against the government of the United States and a department (Department of Agriculture) thereof. The creation of the Commodity Credit Corporation for the handling of government loans on agricultural comomdities was a "bookkeeping device" and that fact cannot cover up the substance of that with which we deal. The false claims here were against money appropriated by Congress from the Treasury of the United States, to be used in carrying out a governmental purpose. If that money were exhausted, Congress had arranged for Commodity Credit to borrow on the credit of the United States. As stafed by the Supreme Court in *Marcus* v. *Hess, supra,* "these funds are as much in need of protection from fraudulent claims as any other federal money and the statute

does not make the extent of their safeguard dependent upon the bookkeeping devices used for their distribution." If the object of the statute was to protect against those who would cheat the United States, then to our minds it is applicable to the instant situation.

In *Marcus* v. *Hess, supra*, the claims were against local municipalities and school districts, but such claims were to be paid from a joint bank account containing both federal and local funds. We believe that situation to be farther removed from the strict statutory language "upon or against the Government of the United States, or any department or officer thereof" than is the situation with which we here deal—a wholly owned governmental corporation set up as a bookkeeping expediency whose *entire* funds are appropriated by the United States, whose profits, if any, go into the treasury of the United States, whose losses are reimbursed from the treasury, and whose actions are binding upon the United States to the extent of many times its capital assets.

In addition *Marcus* v. *Hess, supra*, we believe the Supreme Court's attitude toward wholly owned government corporations has been reflected in a number of other cases which indicate a tendency to disregard corporate form as a stratagem for the evasion of realities. In *Inland Waterways Corp.* v. *Young*, 1940, 309 U. S. 517, 524, the Supreme Court said:

> The true nature of these modern devices (government corporations) for carrying out governmental functions is recognized in other legal relations when realities become decisive. Compare *Clallam County* v. *United States*, 263 U. S. 341; *Emergency Fleet Corp.* v. *Western Union*, 275 U. S. 415. *The funds of these corporations are, for all practical purposes, Government funds;* the losses, if losses there be, are Government's losses. [Emphasis supplied.]

Emergency Fleet Corp. v. Western Union, 1928, 275 U. S. 415, 422, 423:

> It is argued that the government rate should be denied because the Fleet Corporation is a private corporation. In form, it is such. But all of its $50,000,000 capital stock was subscribed and paid by the Shipping Board on behalf of the United States. All has been so held by it ever since. The United States alone has had a financial interest in its capital stock. The United States alone has contributed the additional money needed from time to time for the conduct of its business.
>
> * * * * *
>
> * * * It obviously was not the intention of the Government in employing a corporate agency to deprive itself of the right of priority of transmission and of the lower rates secured through the Post Roads Act.

In *Cherry Cotton Mills v. United States*, 1946, 327 U. S. 536, 539, the Supreme Court held that in a suit against the United States the latter could counterclaim for debts owed a government corporation (Reconstruction Finance Corporation), the corporation being considered the government of the United States within the meaning of the counterclaim statute. In speaking of the Reconstruction Finance Corporation, it stated:

> Its Directors are appointed by the President and confirmed by the Senate; its activities are all aimed at accomplishing a public purpose; all of its money comes from the Government; its profits, if any, go to the Government; its losses the Government must bear. That the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is, an agency selected by Government to accomplish purely governmental purposes.

With equal force it can be said here of the Commodity Credit Corporation that "its Directors are appointed by the President and confirmed by the Senate; its activities are all aimed at accomplishing a public purpose; all of its money comes from the Government; its profits, if any, go to the Government; its losses the Government must bear" and "that the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is, an agency selected by the Government to accomplish purely governmental purposes"—that of making loans on agricultural commodities to support the economy of the nation. We do not believe therefore that it requires a forced construction to hold that false claims filed against Commodity Credit Corporation fall withi the meaning of the Federal False Claims Act as being claims "upon or against the Government of the United States, or any department or officer thereof." We are not dealing with the criminal aspect of a statute requiring "utmost strictness" in construction. The Circuit Court in the *Marcus* v. *Hess* case, *supra,* construed this particular statute with "utmost strictness." In reversing, the Supreme Court specifically repudiated that "interpretative approach." We are dealing with a civil statute providing forfeitures for the making of false claims paid by the government. It was the fair intendment of Congress to include claims where the source of payment was the treasury of the United States. As we have seen, state intermediaries, such as local municipalities and school districts, do not constitute a bar. We cannot see how an intermediary such as a wholly owned governmental corporation could cause such false claims to escape the embrace of the statute.

These cases are reversed and remanded for trial.

U. S. GOVERNMENT PRINTING OFFICE 1987

No. 146

In the Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA, PETITIONER

v.

HOWARD A. MCNINCH, D/B/A THE HOME COMFORT CO., ROSALIE MCNINCH AND GARIS P. ZEIGLER; FREDERICK L. TOEPLEMAN; AND CATO BROS., INC., WILFRED R. CATO, WILLIAM R. CATO, AND MAGIE L. DUNN (NEE: MAGIE L. STONE).

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The consolidated opinion of the Court of Appeals in these cases (R. 12–20) is reported at 242 F. 2d 359. The opinion of the District Court for the Eastern District of South Carolina in *McNinch* (R. 6–10) is not reported. The opinion of the District Court for the Eastern District of North Carolina in *Toepleman* (R. 29–37) is reported at 141 F. Supp. 677. The opinion of the District Court for the Eastern District of Virginia in *Cato* (R. 71–74) is not reported.

JURISDICTION

The judgments of the Court of Appeals in all three cases were entered on February 28, 1957 (R. 20). A petition for a writ of certiorari was filed on May 28, 1957 and was granted on October 14, 1957 (355 U. S. 808). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a claim against funds of the Commodity Credit Corporation—a wholly-owned Government corporation, operating within and as part of the Department of Agriculture, the funds of which are furnished and, if necessary, supplemented by Congress on an annual basis—is a "claim upon or against the Government of the United States, or any department or officer thereof", within the meaning of the civil False Claims Act.

2. Whether a claim against the Federal Housing Administration—an unincorporated, quasi-independent, agency operating within the Housing and Home Finance Agency with funds appropriated by Congress—is a "claim upon or against the Government of the United States, or any department or officer thereof", within the meaning of the civil False Claims Act.

3. Whether a fraudulent claim for a Government guaranty of an FHA home improvement loan constitutes a "claim against the United States", under the Civil False Claims Act, prior to default on the loan and indemnification of the lender by FHA.

STATUTE INVOLVED

The civil False Claims Act (12 Stat. 696, 698, R. S. 3490, 5438, 31 U. S. C. 231) provides in relevant part:

> Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, * * * shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

STATEMENT

These three actions were brought by the United States under the civil False Claims Act, *supra*, p. 3, seeking recovery against each of the respondents for fraudulent claims made or caused to be made by them, in the course of their obtaining Government loans or loan guaranties from either Commodity Credit Corporation or the Federal Housing Administration. The Court of Appeals for the Fourth Circuit, in a consolidated opinion, held the Act to be inapplicable (R. 13–20).

A. THE FACTS. The relevant facts in each case are undisputed and are as follows:

1. *Cato.* Respondents, a corporation and its three principal directors, officers and shareholders, were engaged in the business of cotton ginning and warehousing in Emporia, Virginia (R. 55–56). On August 3, 1948, the Commodity Credit Corporation entered into a Lending Agency Agreement with the corporation, pursuant to the Stabilization Act of 1942 (56 Stat. 767) and the Commodity Credit Corporation Charter Act (62 Stat. 1070), authorizing Cato Bros., Inc., as Commodity's agent, to make nonrecourse loans to producers of eligible 1948 crop cotton (R. 57). The Agreement and the applicable Department of Agriculture regulations (1948 Cotton Loan Instructions, 13 F. R. 4338) authorized the designated agent to receive from cotton producers executed Cotton Producers' Notes, together with warehouse receipts covering cotton pledged as security for the loans (R. 56–58). Each note was required to contain, *inter alia*, a certification by its maker that

he had produced the cotton on which the loan was to be made (R. 57). The Agreement provided that the agent would disburse the face amounts of the notes and thereafter transmit the notes to the Commodity Credit Corporation ("Commodity") (R. 58). Commodity, in turn, would repay the agent the amounts which it had previously disbursed plus interest at the rate of 1½ percent per annum from the date of the notes to the date of payment by Commodity (R. 58). The Agreement required the agent, in transmitting the notes, to certify that the representations by the maker were true to the best of the agent's knowledge and belief, and that the cotton listed on the note was "eligible" cotton as defined in the 1948 Cotton Loan Instructions (R. 58-59).[1]

Between September 1, 1948 and November 30, 1948, respondents induced a number of bona fide cotton producers to sign more than 280 cotton producer note forms in blank (R. 58). On these forms, respondents listed the warehouse receipt numbers of cotton which they had purchased from various sources, but which had not been produced by the makers of the notes (R. 58). The forms were completed by respondents with the following statements falsely certified therein: that the note makers had produced the cotton; that the benefits of the loan evidenced by the

[1] The 1948 Cotton Loan Instructions provided that loans on eligible cotton would be made to eligible producers. An "eligible producer" was defined as any person producing cotton during the year 1948 in the capacity of landowner, landlord, tenant, or sharecropper. "Eligible cotton" was defined as cotton which, *inter alia*, had been produced by the person tendering it for a loan (R. 57).

notes would accrue solely to the note makers and any tenants and sharecroppers having an interest in the cotton; and that the benefits of the loan had not been transferred to any other party (R. 59). In addition, respondent Magie L. Stone, acting with the knowledge and consent of the other respondents, made the required certification with respect to each note that the above statements (purportedly made by the producers) were correct to the best of her knowledge and belief, and that the cotton was "eligible" (R. 59–60). Respondents received payment on the fraudulent notes together with 1½ percent interest—the fee provided as compensation for the use of the money purportedly disbursed by them to the producers (R. 60). However, respondents made no disbursements to the producers—the latter having no interest in the pledged cotton—but rather retained for themselves the Commodity payments (R. 61).

Suit was thereafter brought by the Government under the civil False Claims Act seeking recovery of double damages and forfeitures (R. 55–61). The District Court for the Eastern District of Virginia, following a trial on the merits, gave judgment for the United States (R. 74–75). The court—having previously ruled that a claim against Commodity Credit Corporation is a claim against the United States within the meaning of the civil False Claims Act (R. 69–70)—held that respondents "made and caused to be presented for payment * * * thirty (30) claims upon the United States, knowing the said claims to be

false" (R. 74).[2] A judgment under the Act in the Government's favor was entered in the amount of $60,000, representing a $2,000 forfeiture for each of the thirty transmittal letters (R. 74).[3]

2. *Toepleman.* Respondent Toepleman and Garland Greenway were in partnership as cotton factors and warehousemen with offices in Henderson and Louisburg, North Carolina, during the cotton marketing year from July 1, 1948–June 30, 1949 (R. 31). The Government's 1948 cotton price support program was in force at this time (R. 31) and respondent, desiring to take advantage of this program, set into operation a scheme whereby, though ineligible, he could obtain the low interest non-recourse loans offered by Commodity (R. 32–33). Toward that end, respondent obtained the signatures in blank of 14 bona fide cotton producers on 82 Cotton Producer's Notes—the official forms employed in obtaining cotton loans from Commodity (R. 32).[4] He then purchased 325 bales of 1948 crop cotton from various sources and listed the warehouse receipt numbers and descrip-

[2] Although nearly 300 fraudulent notes had been sent to Commodity, they were forwarded for payment in thirty letters of transmittal. The District Court regarded each letter of transmittal, rather than each note, as a claim under the Act (R. 74).

[3] The Government had additionally sought, in damages, double the amount of the net loss ($31,598.59) which it had incurred in selling the pledged cotton (R. 67). This claim was denied by the District Court on the ground that Commodity held the cotton represented by the notes for an unreasonably long period of time before disposal, and that during the interval the cotton could have been sold at a profit (R. 73).

[4] The District Court found that at all times respondent purported to act through the partnership but acted without Greenway's knowledge (R. 33).

tion of this cotton on the producers notes, representing that the cotton thus listed had been produced by the notes' makers (R. 32). Thereafter, respondent tendered 57 of these notes to the First National Bank of Henderson, North Carolina, and the remaining 25 notes to the First Citizens Bank and Trust Co. of Louisburg, North Carolina—both being Commodity-approved lending agencies—requesting a Government loan on each note (R. 32). The lending agencies, on the basis of the representations made, disbursed the proceeds of the loans to respondent, apparently regarding him or the partnership as agent for the producers whose names appeared on the notes (R. 32). The banks, in turn, transmitted the notes to Commodity and received reimbursement of the proceeds plus 1½ percent interest, all as provided by statute and the 1948 cotton regulations (R. 33). Subsequently, respondent repaid 39 of the notes and redeemed the cotton thereunder (R. 33). Forty-three of the notes went unpaid at maturity and the cotton securing the loans was sold in January 1955 at a loss to the Government of $6,733.97 (R. 33).

Following a hearing at which the foregoing facts were established, the District Court for the Eastern District of North Carolina entered judgment for the Government (R. 37–38). Rejecting respondent's contentions to the contrary, the court held, *inter alia,* that a false claim filed against Commodity Credit Corporation is a "claim upon or against the Government of the United States or any department or officer thereof" within the meaning of the civil False Claims Act (R. 31); that presentation of these claims to the lend-

ing agency caused them to be presented for payment by the Government (R. 35); and that recovery by the Government for each false claim is not dependent upon a showing of loss (R. 36). It went on to find that each of the 82 notes in question pledged ineligible cotton and that such fact was known to respondent at the time (R. 33, 34). The court awarded $164,000 in damages to the United States, holding that each of the 82 notes constituted a separate claim against the Government to which the $2,000 liquidated damages provision of the Act applied. (R. 36, 38).[5]

3. *McNinch.* The Government's complaint, filed in the District Court for the Eastern District of South Carolina, alleged the following: Respondents Howard A. McNinch, Rosalie McNinch, and Garis P. Zeigler were president, secretary, and a salesman, respectively, of an unincorporated home construction business, the Home Comfort Company, located in Columbia, South Carolina (R. 2). At various times from November 6, 1951 to January 10, 1953, respondents presented to the South Carolina National Bank, a Federal Housing Administration-approved lending institution, eleven fraudulent F. H. A. loan credit applications for the purpose of obtaining or aiding to obtain FHA-insured home improvement loans under Title I of the National Housing Act, as amended. (R.

[5] However, the court refused to allow the Government double its ascertainable damages as provided in the Act, holding that the injury to the United States was not "sustained by reason of the doing or committing such act [the false claim]" as required by the statute (31 U. S. 231), but resulted from a drop in the market price of the cotton (R. 36–37).

2–3, 14).[6] The loans were sought on behalf of homeowner customers with whom respondents had contracted to carry out home improvements and were for the purpose of financing such improvements (R. 2–3). The applications, which were entitled "FHA Title I Credit Application (Property Improvement Loan)", were accompanied in each case by a fictitious credit report of the Associated Credit Bureaus (R. 3). Both the applications and the reports misrepresented the financial eligibility of the customers for the loans and were known by the respondents to be fraudulent (R. 3). The applications were submitted, further-

[6] Under Title I of the National Housing Act (12 U. S. C. 1701, *et seq.*), the Federal Housing Commissioner is empowered, upon such terms and conditions as he might prescribe, to insure qualified lending institutions against losses sustained as a result of loans made by them for the purpose of financing alterations, repairs, and improvements upon or in connection with real property. FHA enters into an insurance contract undertaking to indemnify the lenders against loss sustained by them on loans reported for insurance to FHA up to an aggregate amount equal to ten percent of the value of such loans. A borrower, who wishes to obtain an improvement loan, applies to the lending institution on an FHA form ("FHA Title I Credit Application (Property Improvement Loan)"). Responsibility for determining that the borrower is a reasonable credit risk rests with the lending institution, which is permitted to rely on statements of fact made by the borrower (*infra*, p. 65). Within 31 days after the loan is made, the lender must report the details of the loan transaction to FHA on an FHA form provided for the purpose, and must furnish FHA with a statement that the above requirements have been complied with. After the loan is made and the details of the transaction have been reported to FHA, that agency computes the insurance premium which will be due and payable by the lending institution, records the transaction on its official records, and acknowledges the loan for insurance. See 24 CFR 201.0–201.13. See also Appendix, *infra*, pp. 61–67.

more, with the intent that they should be reported to, and accepted by, the Federal Housing Administration for insurance (R. 3). The South Carolina National Bank, relying on the false applications and credit reports, approved the requested loans and applied to the FHA for insurance pursuant to Title I (R. 3). In accordance with its contractual commitment, the FHA, in turn, acknowledged the loans for insurance (R. 3). The proceeds of the loans were deposited to the account of the Home Comfort Co. in the South Carolina National Bank (R. 3).

The complaint alleged that respondents, through the fraudulent credit applications and credit reports submitted by them to the bank, "made or caused to be made, presented or caused to be presented * * * upon the United States for payment or approval", eleven false claims in violation of 31 U. S. C. 231 and also that, between the aforementioned dates, respondents "agreed, combined, and conspired with each other * * * to defraud the United States * * * by obtaining or aiding to obtain the payment or approval of false, fictitious or fraudulent claims for loans or advances of credit insured by the Federal Housing Administration" (R. 3, 4, 14). The Government sought $2,000 in liquidated damages for each of the eleven fraudulent loan applications pursuant to the provisions of the civil False Claims Act (R. 4).[1]

[1] In respondents' Court of Appeals brief (pp. 2–3), it was stated that, before the present action was brought, respondent Howard A. McNinch repurchased all of the outstanding FHA-insured loans and mortgages and assigned them to the bank for collection; and further that McNinch and Garis P. Zeigler were convicted of making false statements for the purpose of obtain-

Respondents moved to dismiss the Government's action on the ground that the complaint failed to state a claim upon which relief could be granted (R. 5–6). The District Court granted this motion (R. 6–10). The court held that the bank was not the Government or a department thereof, and that the fraudulent loan applications and credit reports presented to it did not constitute claims "upon or against the Government of the United States, or any department or officer thereof" within the meaning of the Act (R. 9). The court further expressed its agreement with the view that the statutory term "claim" signifies a demand for money or property as of right and that, as the loans had not been defaulted, no such demand had been made upon the Government and the Act had not been violated (R. 9–10).

B. THE DECISION BELOW. The Court of Appeals for the Fourth Circuit disposed of the three cases in a single opinion (R. 12–20). It reversed the judgments in *Cato* and *Toepleman*—the cases involving Commodity Credit Corporation—holding that the civil False Claims Act was inapplicable since a "government corporation, even though acting as an agency of the government is not the government, nor is it a department or officer of the government" (R. 17). The *McNinch* dismissal was affirmed by the Court of Appeals on the same ground, notwithstanding the fact that the false claims there involved were against the Federal Housing Administration, an unincorporated agency of the Government (R. 19–20); *infra*, pp.

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ing FHA-insured loans in violation of 18 U. S. C. 1010. See also, R. 14.

40–44). As an alternative ground for holding the Act inapplicable in *McNinch*, the Fourth Circuit stated that "the obtaining of the guaranty of loan was not the making of a claim with the meaning of the statute. *United States* v. *Tieger*, 3 Cir. 234 F. 2d 589, certiorari denied, 352 U. S. 941; *United States* v. *Cochran*, 5 Cir. 235 F. 2d 131, certiorari denied, 352 U. S. 941." (R. 20.)

SUMMARY OF ARGUMENT

I

Both Commodity Credit Corporation and the Federal Housing Administration are embraced within the phrase the "Government of the United States" as used in the civil False Claims Act (R. S. 3490 as it incorporates R. S. 5438; 31 U. S. C. 231). The contrary holding of the court below reflects the mechanical approach to the scope of the Act which this Court rejected in *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, and stems from a conception of the nature of a Government corporation which no longer retains vitality. The decision below is in conflict with *United States* v. *Rainwater, et al.*, 244 F. 2d 27, No. 276, this Term, certiorari granted, 355 U. S. 811, October 14, 1957. In *Rainwater*, the Court of Appeals for the Eighth Circuit accords recognition to the realities which have led this Court in recent decades to view the modern wholly-owned Government corporation as indistinguishable from the Government itself in circumstances comparable to those presented here. Giving full play to the functional interpretation properly accorded the civil False Claims Act in *Hess*, the

Eighth Circuit holds that Commodity—the Government corporation there involved—is nothing more than a "bookkeeping device" in its handling of Federal monies and that a fraudulent claim to those monies is a claim against the "Government of the United States" within the meaning of the Act. We submit that the Eighth Circuit is correct.

A. (1). The civil False Claims Act was designed to afford protection against those who would "cheat the United States." Its terms are broad enough to embrace those agencies of the Government, whenever and in whatever form created, whose activities render property of the United States vulnerable to fraudulent claims; those terms are not limited to the agencies or types of agencies in existence at the time of the Act's original passage. Recent decisions of this Court refute the view that a Government agency, because of its corporate form, must be accorded, for all purposes, a status apart from that of the Government itself. To the contrary, they teach that the identity of such corporations with the Government will be recognized "when realities become decisive". *Inland Waterways Corp.* v. *Young*, 309 U. S. 517, 524; see also, *Cherry Cotton Mills* v. *United States*, 327 U. S. 536. The nature of the corporate agency and activity involved must therefore be appraised; and the corporate shell is particularly transparent where, as here, public funds are involved.

(2). Properly framed, the issue is whether, when Congress created Commodity, it was done in such a manner as to make that agency a part of the "Government of the United States" for purposes of the

civil False Claims Act. Every relevant aspect of Commodity's structure, especially its financial status, bespeaks identity. The agency's funds are supplied by the Government, its losses borne by the Government, and its obligations are unconditionally guaranteed by the United States. For False Claims Act purposes, and under the pragmatic view adopted in *Hess, supra,* this fiscal identity is critical since a claim against Commodity's funds is a claim against the monies of the United States—the type of claim the Act was unquestionably intended to reach. Commodity—and through it, the United States—is particularly vulnerable to false claims because of the nature of the federal programs which it executes. The remedial provisions of the civil Act are essential if the vast amounts of public funds committed to these programs are to receive the safeguards to which they are entitled.

(3). The force of the foregoing considerations is not diminished by virtue of the fact that the criminal False Claims Act was amended in 1918 to cover claims against corporations "* * * in which the United States of America is a stockholder", with no comparable amendment being made in the language of the civil Act. The 1918 amendment to the criminal Act was designed to cover the Emergency Fleet Corporation, a locally incorporated entity whose charter contemplated stock ownership by private parties as well as the Government. *United States* v. *Bowman,* 260 U. S. 101–102; *Sloan Shipyards Corp.* v. *U. S. Fleet Corporation,* 258 U. S. 549, 565. The applicability of a criminal statute to such a corporation, on the

basis of its being the "Government of the United States," was understandably subject to doubt. However, the modern wholly-owned Government corporation, such as Commodity, bears little resemblance to the pioneer Fleet Corporation. Commodity's status as a part of the "Government of the United States" for purposes of the civil Act must be determined in the light of Commodity's own characteristics—markedly different than those of its World War I forerunners. Congress, in other words, *could* create a Government corporation so as to bring it within the broad statutory coverage of the civil Act and, we submit, in the case of Commodity this is precisely what Congress has done.

Similarly immaterial is the fact that Commodity's Charter Act provides criminal penalties for false statements to the corporation without expressly providing for civil liability. 15 U. S. C. 714m (a). The civil False Claims Act is one of general applicability and, unless special statutory provision is made excluding coverage, its provisions are fully applicable to an agency of Government otherwise within its scope. Significantly, the Charter Act provides only that the general *penal* statutes will be inapplicable to offenses specifically covered therein. 15 U. S. C. 714m (e).

B. The status of the Federal Housing Administration as a part of the "Government of the United States" is even clearer than that of Commodity. Not even a corporate shell distinguishes FHA from the "Government of the United States", and the agency's substantive identity with the Government has already been acknowledged by this Court. *United States* v.

Emory, 314 U. S. 423; *United States* v. *Summerlin*, 310 U. S. 414. The power conferred upon the head of that agency "to sue and be sued" was not a grant of corporate status. Congress merely withheld the immunity from suit which it could have conferred and also, for purposes of convenience, allowed the Commissioner to press agency claims in his own name. See *Korman* v. *Federal Housing Administration*, 113 F. 2d 743 (C. A. D. C.); cf. *Federal Housing Administration* v. *Burr*, 309 U. S. 242. The agency's subjection to the auditing and budgetary provisions of the Government Corporation Control Act (31 U. S. C. 841, *et seq.*) was designed solely to afford greater control over its operations and, rather than indicating insulation from the Government, is a further sign of identity.

II

A. A claim of right to FHA loan insurance is a "claim" against the United States under the False Claims Act irrespective of default on the loan insured and indemnity payment by the Government. The lower court's contrary holding in *McNinch*—stated as an alternative reason for the Act's inapplicability to the FHA claims—is based on similar prior decisions by the Third and Fifth Circuits. *United States* v. *Tieger*, 234 F. 2d 589 (C. A. 3), certiorari denied, 352 U. S. 941; *United States* v. *Cochran*, 235 F. 2d 131 (C. A. 5), certiorari denied, 352 U. S. 941. Both *Tieger* and *Cochran* declare the Act applicable solely to demands for Government "money or property" and hold that a claim of right to Government credit insurance does not so qualify—at least in the absence of a subsequent default. These decisions insert a

questionable qualification upon the plain terms of the Act which speak of "any claim". But even if the statute be construed to cover only claims for "money or property", the present claims to Government credit insurance are within the statutory purview since they constitute claims to Government "property". In our highly developed commercial economy, the credit of the Government, no less than that of private parties, represents a valuable property interest, and only under the narrowest of conceptual views can that credit be relegated to a status less than that of the Government's tangible assets. The insurance which the Federal Housing Administration is authorized to provide—and which commits the Government's credit—is manifestly of substantial value, both to the borrower who seeks his loan on the basis of eligibility for such insurance and to the lending institution whose loan is ultimately insured. In its private forms, such insurance is a well-recognized item of commerce and constitutes a valuable and enforceable property right. If anything, a Government loan guaranty has added value since the risk undertaken by the United States is premised upon an unwillingness of private interests to hazard their resources on comparable terms. These circumstances provide ample incentive for those who, like respondents in *McNinch,* desire to obtain the benefits of the Government's credit at a risk the Government would not knowingly undertake. Every consideration indicating statutory coverage where the tangible properties of the Government are involved applies here with equal force.

B. A default upon a loan which the Government is fraudulently induced to insure is not a condition precedent to invocation of the remedial provisions of the False Claims Act. The sole effect of a default is that it gives rise to a specific ascertainable loss, the absence of which clearly does not preclude civil recourse against the defrauder. *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537; *Rex Trailer Co., Inc.* v. *United States*, 350 U. S. 148. Moreover, to delay the defrauder's amenability to the False Claims Act until there has been a default severely limits the efficacy of the Government's remedy—a remedy which seeks compensation for injuries in no way dependent upon a default and a consequent out-of-pocket loss. Cf. *Rex Trailer, supra*, 350 U. S. at 153–154. The interim between claim and default may well see such a depletion in the defrauder's resources as to make the civil remedy meaningless. Indeed, where the borrower is the defrauder, the default itself signals financial irresponsibility. Add to this the evidentiary problems which such a delay may entail, and the desirability of immediate recourse against the defrauder is manifest. The statute permits such immediate recourse.

ARGUMENT

I

Fraudulent Claims Presented or Caused To Be Presented to Commodity Credit Corporation or the Federal Housing Administration Constitute Claims Against the "Government of the United States" Under the civil False Claims Act

The primary basis for the decision below is the narrow reading given the term "Government of the

United States" as it is used in the civil False Claims Act (R. S. 3490 as it incorporates R. S. 5438; 31 U. S. C. 231). The court holds, in substance—treating both the incorporated Commodity and the unincorporated Federal Housing Administration, alike, as "government corporations" (R. 19)—that a wholly-owned Government corporation, operating exclusively as an instrumentality of the United States, and executing federal programs with public monies, is not the "Government of the United States" within the meaning of a statute designed to "provide protection against those who would 'cheat the United States.'" (*United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 544).

Underlying the Fourth Circuit's decision is a stress upon form to the almost complete exclusion of substance and a conception of the wholly-owned Government corporation outmoded both by Congressional action and the decisions of this Court. These factors have been given proper perspective by the decision of the Court of Appeals for the Eighth Circuit in *United States* v. *Rainwater, et al.* (244 F. 2d 27, certiorari granted, 355 U. S. 811), No. 276, this Term, now pending before this Court. There, as in the *Cato* and *Toepleman* parts of the present case, the Government had brought suit under the civil False Claims Act seeking recovery for fraudulent claims caused to be presented to Commodity by persons ineligible to receive non-recourse cotton loans but who nevertheless applied for and received loans on cotton produced by others. Categorically rejecting the earlier Fourth Circuit decision, the Eighth Circuit ruled that the Act applied to

false claims against Commodity. Central in *Rainwater* was the court's determination "that the ultimate source of payment of the fraudulent claims was the federal treasury and when so viewed there can be no distinction between a government corporation or the government itself being defrauded" (244 F. 2d at 29–30). Commodity's fiscal structure revealed it to be nothing more than a "bookkeeping device" for the handling of Government money—a matter of form which could not be allowed to obscure substantive realities in view of the functional interpretation of the Act dictated by *Marcus* v. *Hess* (*ibid.*, at 30–31). The Eighth Circuit stressed, also, decisions of this Court in recent years which had recognized the identity of the Government with its wholly-owned corporations in comparable circumstances (*ibid.*, at 31–32). The court concluded, we believe correctly, that no forced construction of the civil False Claims Act was needed to hold that false claims filed against Commodity fell within "the embrace of the statute" (*ibid.*, at 32).

A. COMMODITY CREDIT CORPORATION IS A PART OF THE "GOVERNMENT OF THE UNITED STATES" WITHIN THE MEANING OF THE CIVIL FALSE CLAIMS ACT

1. *The statutory term "Government of the United States"*

(a). The statutory language with which we are here concerned stems from the Act of March 2, 1863 (12 Stat. 696). Congress there provided both criminal penalties and civil recovery for the commission of specified acts, among which was the making of false, fictitious or fraudulent claims "against the Govern-

ment of the United States, or any department or officer thereof". The civil liability portion of the Act was subsequently codified in 1878 as Section 3490 of the Revised Statutes and the criminal provisions were separately enacted as R. S. 5438. Section 3490 provided for forfeitures and double damages if certain acts prohibited by R. S. 5438 should be committed; and Section 5438, in turn, encompassed generally the presentation for payment or approval of false claims "against the Government of the United States or any department or officer thereof".[8]

This general language has no further definition in the statute. Congress apparently assumed the sufficiency and flexibility of these words to cover operations to the Government which would render it vulnerable to those who would "cheat" it. The terms themselves are plainly comprehensive in scope, containing no limitation as to specific agencies or types of agencies that comprise "the Government of the United States". Moreover, as we read them, there is no implication in the words—nor does any appear in the legislative history—of a Congressional intent to limit the statutory protection to certain modes of Government operations or to then-existing opportunities for defrauding the United States. The broader reading is fully

[8] The civil provisions which have application to the present proceedings have not been amended since their enactment as part of the Revised Statutes in 1878, and are set forth, as they now stand, at 31 U. S. C. 231 (*supra*, p. 3). In 1909, R. S. 5438 was repealed (35 Stat. 1153) and superseded by Section 35 of the Criminal Code, 35 Stat. 1095. These criminal provisions were subsequently amended on several occasions and are now contained, in their amended form, in 18 U. S. C. 287 and 1001.

consonant with the fundamental intention of Congress which, as stated by the original Act's sponsor, was to provide protection against those who would "cheat the United States". Cong. Globe, 37th Cong., 3rd Sess., 952; see *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537, 544. It is in harmony, moreover, with this Court's enjoinder that the safeguard which Congress provided is not subject to diminution by virtue of the "bookkeeping devices" that may be employed by the Government in carrying out its operations. *Marcus* v. *Hess, supra,* at pp. 544–545. In short, nothing in the Acts of 1863 and 1878, or in the history of their enactment, would indicate that the term "Government of the United States" was other than what it purports to be on its face—an open-ended, all-embracing term, sufficient to include the agencies through which the United States would carry on its activities and which, in turn, would provide targets for fraudulent claims against the public purse.

Concededly, the use of wholly-owned Government corporations to execute public programs and expend public monies is, for all practical purposes, a contemporary innovation. It is unlikely, therefore, that this method of carrying on the Government's business was of specific concern to the Congress either in 1863 or in 1878.[9] We submit, however, that it is

[9] Government-owned corporations were, of course, not unknown even in 1863. The Smithsonian Institution was incorporated in 1846 (9 Stat. 102). Congress, moreover, had chartered corporations such as banks and railroads "as appropriate means of executing the powers of government". *Luxton* v. *North River Bridge Co.,* 153 U. S. 525, 529; cf. *McCulloch* v. *Mary-*

immaterial whether or not Congress specifically contemplated a wholly-owned Government corporation when it employed the general term "Government of the United States". The issue, properly put, is whether when Congress created the Commodity Credit Corporation it did so in such a manner as to make Commodity part of the "Government of the United States". We show below in detail (*infra*, pp. 28–32) that Congress so acted.

By adopting as its basic premise the proposition that a government corporation "is not the government" (R. 17), the court below failed to recognize the status of modern corporate entities, as instruments of Government, resulting from post-World War I substantive legislative and judicial development. Rather, the Fourth Circuit places principal reliance on cases dealing with the Emergency Fleet Corporation (R. 17–18) which express some earlier concepts of the nature of a Government corporation that have lost their vitality.

The Fleet Corporation was a pioneer effort in employing a corporate device to carry out a Governmental program in which commercial considerations were of prime importance. The corporation was formed in 1917 by the Shipping Board pursuant to the specific authority to create corporations conferred by Section 11 of the original Shipping Board Act of September 7, 1916 (39 Stat. 728, 731). It was char-

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land, 4 Wheat. 316. But the latter bear no relation to the wholly-owned Government corporation; rather, they were private corporations in which the Government had an interest. Cf. *Emergency Fleet Corp.* v. *Western Union Telegraph Co.*, 275 U. S. 415, 426.

tered under the general laws of the District of Columbia as a private corporation with the power, *inter alia*, to purchase, construct and operate merchant vessels. Pursuant to Section 11 of the Act, *supra*, the Board, on behalf of the United States, was to purchase not less than a majority of the stock and, with the President's approval, it could sell all of such stock or any part thereof—with the restriction that no partial sale could be made which left the United States as a minority stockholder.[10] Understandably, this novel hybrid-entity, chartered like any private business under local law and in which private persons as well as the Government might become stockholders, occupied an uncertain position insofar as its status as part of the Government was concerned. Cf. *Sloan Shipyards* v. *U. S. Fleet Corporation*, 258 U. S. 549; *Skinner & Eddy Corporation* v. *McCarl*, 275 U. S. 1; *United States* v. *Strang*, 254 U. S. 491; *United States* v. *Walter*, 263 U. S. 15.

However, the magnitude of governmental operations undertaken in corporate form, as well as the evolving nature of the wholly-owned Government corporation, has led this Court in recent decades to adopt a somewhat different approach to the status of these agencies. Any residuum of "proprietary" thinking has been discarded (cf. *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 477; *Fed. Land Bank* v. *Bismarck Co.*, 314 U. S. 95, 102) and corporation identity with the Government has been accepted where

[10] The Government, subsequent to the corporation's formation, purchased and retained all of the capital stock. See *Sloan Shipyards* v. *U. S. Fleet Corporation*, *supra*, at 565.

realities so dictate—particularly where public properties are involved. The Court has held, for example, that the Reconstruction Finance Corporation, a Government corporation comparable to Commodity, is the "Government of the United States" for purposes of a statute allowing counterclaims in the Court of Claims (*Cherry Cotton Mills* v. *United States*, 327 U. S. 536); that a national bank may pledge its assets to secure deposits of Government corporations, despite the fact that the National Banking Act permits pledges only to secure deposits of "Treasury" funds (*Inland Waterways Corp.* v. *Young*, 309 U. S. 517); that the Federal Crop Insurance Corporation is the Government for purposes of precluding contractual liability on the basis of an estoppel (*Federal Crop Ins. Corp.* v. *Merrill*, 332 U. S. 380); and that the assets of a Government corporation are immune from state taxation since they are the property of the United States (*Clallam County* v. *United States*, 263 U. S. 341). See also *Emergency Fleet Corp.* v. *Western Union Telegraph Co.*, 275 U. S. 415; *U. S. Grain Corporation* v. *Phillips*, 261 U. S. 106; cf. *Federal Land Bank* v. *Bismarck Co.*, 314 U. S. 95, 102.

Moreover, because of the nature of the relationship between a Government-owned corporation and the United States, it has been uniformly recognized that the United States may sue in its own name upon claims which arise out of the transactions of such corporations—the Government being the real party in interest. Cf. *Cherry Cotton Mills* v. *United States*, 327 U. S. 536; *New Brunswick* v. *United States*, 276 U. S. 547; *Clallam County* v. *United*

States, 263 U. S. 341; *Erickson* v. *United States*, 264 U. S. 246. Congress has, in fact, made specific provision for this in the Commodity Credit Corporation Charter Act, 15 U. S. C. 714b (c); cf. *United States* v. *Lindsay*, 346 U. S. 568. Thus, the fact that Congress has invested its corporate agencies with power to "sue and be sued" in their own names—a factor stressed by the court below (R. 17–18)—does not make them any less a part of the Government for purposes of enforcing the rights of the United States. This merely constitutes a waiver of the sovereign immunity which Congress could have bestowed upon its agencies (*Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381, 389) and also subjects these instrumentalities to certain incidents of litigation such as liability for costs (*Reconstruction Finance Corporation* v. *Menihan Corp.*, 312 U. S. 81) and, where not precluded (see 15 U. S. C. 714b (c)), garnishment proceedings (*Federal Housing Administration* v. *Burr*, 309 U. S. 242). But the agency, despite these characteristics and its corporate name, is not converted into "something other than what it actually is, an agency selected by Government to accomplish purely governmental purposes" (*Cherry Cotton Mills* v. *United States*, 327 U. S. 536, 539) and whose funds "are, for all practical purposes, Government funds" (*Inland Waterways Corp.* v. *Young*, 309 U. S. 517, 524).

In short, the "true nature of these modern devices [Government corporations] for carrying out governmental functions is recognized * * * when realities become decisive". *Inland Waterways Corp.* v. *Young*,

309 U. S. 517, 524." With that perspective, a survey of the organizational and fiscal structure of Commodity demonstrates that it is as much a part of the "Government of the United States" as any regular department or non-corporate agency, and that its funds—which are the Government's funds—are entitled to the protection of the civil False Claims Act.

2. *The Structure of Commodity Credit Corporation*

Whether the decisive realities to which this Court has referred, *supra,* be structural, functional, or fiscal, no practical distinction can be drawn for the purposes

[11] These realities should be recognized in weighing the force of the decision in *United States ex rel. Salzman* v. *Salant & Salant, Inc.*, 41 F. Supp. 196 (S. D. N. Y.), relied on by the court below for the proposition that a Government corporation is not the Government within the meaning of the False Claims Act. The false claims there involved were made against the American Red Cross which the court held not to be a part of the Government even though it was incorporated under an act of Congress and received a donation from the United States to be used for a specified purpose. The court stated that "In no sense are its funds the property of the Government", 41 F. Supp. at p. 197. The distinction between the Red Cross and a wholly-owned Government corporation such as Commodity is readily apparent. The former is a quasi-public, principally volunteer organization, operating primarily on public contributions, whereas the latter is a Government instrumentality, staffed by federal employees and operating on Government funds. In any event, it is noteworthy that *Salzman* was relied upon by the Third Circuit in *Hess* (127 F. 2d 233, 237) which decision was subsequently overturned by this Court (317 U. S. 537). Moreover, in a later decision of the District Court for the Southern District of New York, it was expressly held that a wholly-owned Government corporation, Federal Surplus Commodities Corporation, was the Government for purposes of the False Claims Act, *United States* v. *Samuel Dunkel & Co.*, 61 F. Supp. 697, 699 (S. D. N. Y.).

of the civil False Claims Act between Commodity Credit Corporation and the Government itself.

The Commodity Credit Corporation Charter Act (62 Stat. 1070, 15 U. S. C. 714, *et seq.*) establishes Commodity as "an agency and instrumentality of the United States, within the Department of Agriculture", created for the purpose of stabilizing farm income and prices, assisting in the maintenance of balanced and adequate supplies of agricultural commodities and of facilitating their orderly distribution.[12] Management of Commodity is vested by the Act in a board of directors, subject to the general supervision of the Secretary of Agriculture who, as an *ex officio* director, serves also as chairman of the board. 15. U. S. C. 714g (a). Six other directors are appointed by the President with the advice and consent of the Senate and perform such other duties as are prescribed by the Secretary. 15 U. S. C. 714g (a). The directors and officers are all officials of the Department of Agriculture, being compensated as such rather than as officers of Commodity. Similarly, all

[12] Commodity was originally incorporated under Delaware law. In 1939, the corporation, its functions and activities, together with its personnel, records and property were transferred to the Department of Agriculture (1939 Reorg. Plan No. 1, § 401, 4 F. R. 2730, 53 Stat. 1429). Administration of the corporation's programs was subsequently consolidated in the Production and Marketing Administration of that Department (1946 Reorg. Plan No. 3, § 501, 11 F. R. 7877, 60 Stat. 1100). In 1948, the corporation was reincorporated under a Congressional charter, in compliance with the provisions of the Government Corporation Control Act (59 Stat. 597, 602), which required federal incorporation if Commodity was to remain a Government instrumentality. See Senate Report No. 1022, 80th Cong., 2d Sess., p. 5.

of Commodity's other employees are employed by the Department of Agriculture, many spending part of their time on corporation affairs and part on other departmental matters, as was specifically contemplated by the Act creating Commodity. See 15 U. S. C. 714g (a), 714i; see also Senate Report 1022, Committee on Agriculture and Forestry, 80th Cong., 2d Sess. The corporation, apart from its intra-departmental status, is subject to the auditing, budgetary and other provisions of the Government Corporation Control Act. 31 U. S. C. 846, *et seq.*; see, *infra*, pp. 37–38.

Other elements in the agency's statutory makeup merit attention. Commodity is to have "all the rights, privileges, and immunities of the United States" with respect to priority of payment of debts due from insolvent, deceased, or bankrupt debtors. 15 U. S. C. 714b (e). The notes and other obligations issued by it are to be deemed instrumentalities of the United States and, as such, they and their income are exempted from almost all federal and local taxation. 15 U. S. C. 713a–5. Furthermore, the corporation's property is exempt from federal taxation and, with the exception of real estate, from all local taxation. 15 U. S. C. 713a–5.

Of even greater significance, we believe, in fixing Commodity's status for False Claims Act purposes, is the source of the agency's funds. Commodity's entire original capital, $100,000,000, was supplied by the United States. 15 U. S. C. 714c. By statutory directive, the Secretary of the Treasury must make an annual appraisal of Commodity's net worth and, if the net worth is less than $100,000,000, the Treasury must

restore the amount of the capital impairment. 15 U. S. C. 713a–1. If the appraisal reveals any excess over $100,000,000, the Treasury is to be its recipient. 15 U. S. C. 713a–2.[13] In addition, Commodity is authorized to borrow up to fourteen and one-half billions of dollars on the credit of the United States to carry out its statutory programs. 15 U. S. C. (Supp. IV) 714b (i). In sum, the funds of this corporation "are, for all practical purposes, Government funds; the losses, if losses there be, are the Government's losses". *Inland Waterways Corp.* v. *Young,* 309 U. S. 517, 524.

We agree with the Court of Appeals for the Eighth Circuit which, in *Rainwater,* found no material distinction between Commodity and the Reconstruction Finance Corporation the wholly-owned Government corporation before the Court in *Cherry Cotton Mills* v. *United States,* 327 U. S. 536. Here, as in *Cherry Cotton Mills* (327 U. S. at 539):

> * * * [The corporation's] Directors are appointed by the President and confirmed by the Senate; its activities are all aimed at accomplishing a public purpose; all of its money comes from the Government; its profits, if any, go to the Government; its losses the Government must bear. That the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than

[13] Because of the nature of the programs which it executes, Commodity is plainly not a profit-making venture. Thus, recent acts of Congress have directed restoration of Commodity's capital impairment in the following amounts: 70 Stat. 238 ($929,287,178); 69 Stat. 60 ($1,634,659); 67 Stat. 222 ($96,205,161); 66 Stat. 354 ($109,391,154); 65 Stat. 244 ($427,000,000).

> what it actually is, an agency selected by Government to accomplish purely governmental purposes. * * *

If Commodity's characteristics are such as to qualify it as the "Government of the United States" in other areas on the basis of an inseparability of interests, there is no valid ground for denying it that status under the civil False Claims Act. To the contrary, if the Act's purpose is to provide protection against those who would "cheat the United States", the relevant considerations—particularly those relating to Commodity's fiscal structure—militate in favor of a determination of identity.

3. *This Court's Decision in Marcus* v. *Hess*

The functional interpretation of the False Claims Act's language—the "Government of the United States"—which the Government seeks in this case is fully supported by this Court's decision in *Marcus* v. *Hess*, 317 U. S. 537. In that case, an informer's *qui tam* action under the civil False Claims Act, federal monies had been granted by the Public Works Administrator to local municipalities and school districts in Pennsylvania, to be expended on public works projects. The defendants, officers and members of the Electrical Contractors Association of Pittsburgh, conspired to rig the bidding on these projects. As a consequence, false claims were asserted against and payment made by the state agencies—under *their* contracts with defendants—from joint bank accounts containing both state and federal funds. The Federal Government was, accordingly, required to contribute more for the

electrical work on the projects than it would have been required to pay had there been *bona fide* competition in the contracting between defendants and the municipalities. The Court of Appeals for the Third Circuit, reversing a District Court judgment against the contractors, held that the False Claims Act must be construed with "utmost strictness", that it did not apply to a false claim presented by or to a third party or where the defendant had no direct contractual relationship with the United States, and that claims on fraudulent contracts with non-federal agencies were not claims against the United States under the Act (127 F. 2d 233). This Court reversed, stating that "We cannot accept either the interpretive approach or the actual decision of the court below" (317 U. S. at 541). The Court held that it was the Act's "purpose to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government" (317 U. S. at 544–545). In so holding, the Court stated (317 U. S. at 544):

> Government money is as truly expended whether by checks drawn directly against the Treasury to the ultimate recipient or by grants in aid to states. * * *. These funds are as much in need of protection from fraudulent claims as any other federal money, and the statute does not make the extent of their safeguard dependent upon the bookkeeping devices used for their distribution. The Senatorial sponsor of this bill broadly asserted that its object was to provide protection against those

who would "cheat the United States". The fraud here could not have been any more of an effort to cheat the United States if there had been no state intermediary.

In short, under *Hess*, the source of the funds against which claims are made is critical in determining civil False Claims Act coverage. The fact that claims for federal monies are paid by an intermediary—even a non-federal intermediary—does not deprive the monies of the statute's protection.

Here, of course, we are dealing, not with a "state intermediary", but with a wholly-owned Government corporation and the sole source of the funds against which these fraudulent claims were made was the federal Treasury. It is the Government which derives the agency's profits, bears its losses, and unconditionally guarantees all of its obligations.[14] Fraudulent claims against this agency's funds are, in any realistic view, claims against the monies of the "Government of the United States"; and such claims—as this Court affirmed in *Hess*—are perforce within the reach of the Act.

There can be no question that the type of operations in which Commodity engages—and through which federal monies are committed—renders the agency vulnerable to fraudulent claims, thus making the

[14] That the "charge upon the public treasury" may be, in some instances, an "indirect one" is "immaterial" in determining unity of interest in the corporation's funds. *Emergency Fleet Corp.* v. *Western Union Telegraph Co.*, 275 U. S. 415, 424. Similarly "without legal significance" is the fact that Commodity exacts a charge for some of its services, since many nonincorporated agencies of the Government "receive fees, or some other form of compensation, for services rendered to private persons". *Ibid.*, at 424.

Act's coverage a practical necessity. The latest published report of the Secretary of Agriculture, for example, states that funds committed to Commodity's price support programs alone totaled $8,257,308,000 at the end of June, 1956, and that for 1955 the total was over seven billions. Report of the Secretary of Agriculture, 1956, p. 46. The central operational feature of these programs is the claim of entitlement to a price support loan.[15] If the Government is to be protected from speculators and other ineligible claimants who would falsely assert entitlement to price support benefits, the remedial provisions of the False Claims Act must be available to it. Illustrative of this is the fact that at the present time there are approximately 314 cases now pending in the Department of Justice or before the various District Courts, involving over 10,000 claims and totalling in excess of $3,000,000 in ascertainable damages alone. Thus, "complete indemnity for the injuries done" the Government by non-legitimate claimants under these loan programs requires applicability of the Act. *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 549; Cf. *Helvering* v. *Mitchell*, 303 U. S. 391, 401.

4. *The Proper Significance of the Criminal Liability Provisions*

(a). In its holding that the language of the civil False Claims Act is not broad enough to cover fraudulent claims against Government corporations, the court

[15] We are advised by the Department of Agriculture that over 5 million distinct claims are annually processed by Commodity in the administration of these price-support programs.

below stated that it was "bound to give consideration" (R. 19) to the fact that the language of R. S. 3490—the civil Act—had not been amended specifically to include such claims, whereas amendments were made in the criminal Act to cover false claims against corporations "in which the United States of America is a stockholder" (40 Stat. 1015). However, in giving consideration to this fact, the court below disregarded the background of the criminal Act's amendment, and the nature of the modern wholly-owned Government corporation—both critical factors.

In 1918, the criminal Act (then contained in Section 35 of the Criminal Code) was amended to cover corporations in which the United States was a stockholder (40 Stat. 1015). The amendment was "evidently intended to protect the Emergency Fleet Corporation in which the United States was the sole stockholder" (*United States* v. *Bowman*, 260 U. S. 94, 101–102, but as to which Congress had "contemplated a corporation in which private persons might be stockholders and which was to be formed like any business corporation under the laws of the District [of Columbia]" (*Sloan Shipyards* v. *U. S. Fleet Corp.*, 258 U. S. 549, 565; see *supra*, pp. 24–25). It is not difficult to understand how doubt could arise as to whether a locally-incorporated entity which admitted of partial private ownership could be deemed the "Government of the United States" for the purposes of a statute imposing criminal penalties. This, however, is not our problem in determining the status of Commodity with reference to the civil Act. The type of hybrid-entity with which Congress was dealing in 1918 is markedly dif-

ferent from Commodity. Federal (as contrasted to local) incorporation, and the absence of any provision for private ownership, are only surface indications of the change. The truly distinguishing marks of the earlier Government corporations, such as semi-autonomous management and self-contained financing, have disappeared to such an extent in corporations like Commodity that little remains save the corporate name to differentiate the latter from other agencies of the Executive[16]. The process of amalgamation was intensified with the enactment of the Government Corporation Control Act, pursuant to which Commodity was federally chartered (*supra*, p. 29) (31 U. S. C. 841, *et seq.*). Among other things, this Act virtually eliminated "an important if not the chief reason" for the creation of the earlier incorporated agencies—an autonomy in financial transactions supposedly inconsistent with the type of accountability required of the regular agencies of Government (*Skinner & Eddy Corp.* v. *McCarl*, 275 U. S. 1, 8). The Control Act's provisions themselves afford persuasive evidence of a Congressional indisposition to treat these corporate agencies as entities apart from the Government.[17]

[16] Cf. Pritchett, *The Paradox of the Government Corporation*, 1 Public Admin. Review (1941) 381; Dimock, *Government Corporations; A Focus of Policy and Administration, I*, 43 Am. Pol. Sci. Rev. 899; Lilienthal and Marquis, *The Conduct of Business Enterprises By the Federal Government*, 54 Harv. L. Rev. 545, 556–567.

[17] The Government Corporation Control Act (59 Stat. 597, as amended, 31 U. S. C. 841, *et seq.*) provided *inter alia*, that: (1) no Government corporation was to be created or acquired thereafter, except pursuant to an act of Congress authorizing it; (2) federal incorporation of all state corporations with

Thus, whether Commodity can be classified as a part of the "Government of the United States" must be determined with reference to factors which had no application in the case of the pioneer Government corporations. Otherwise stated, it is immaterial that the criminal Act was thought to need amendment to cover the type of Government corporation existing in 1918; what is here controlling is whether Congress, in establishing Commodity some 30 years later, did so in such a manner as to bring that agency within the civil False Claims Act. The considerations which have been previously discussed (*supra*, pp. 28–37) dictate an affirmative answer. The enhanced perspective resulting from decisions of this Court in other areas where "realities" have dictated status (cf. *Cherry*

Government ownership was required to be effected prior to June 30, 1948; (3) each corporation was required to present an annual budget through the Bureau of the Budget to the President and Congress setting forth its plan of operations; (4) the budget submitted was to be the basis for appropriations and for Congressional authorization to use corporate funds or other financial resources for operating and administrative expenses; (5) estimates were required of the amount of Government capital which might be returned to the Treasury, or which might be required for restoration of capital impairment; (6) the Corporation Audits Division of the General Accounting Office was commissioned to audit corporation accounts annually; (7) the Comptroller General was required to report on the expenses of each, the origin of its funds and its financial status, with comments on irregularities; (8) all banking and checking accounts of more than $50,000 were to be kept with the Treasury; and, (9) purchases or sales of United States obligations in amounts exceeding $100,000 were prohibited unless approved by the Secretary of the Treasury and all obligations issued required the Secretary's approval as to form, denomination, maturity, interest rate terms and conditions.

Cotton Mills v. *United States*, 327 U. S. 536; *Inland Waterways Corp.* v. *Young*, 309 U. S. 517) serves to reinforce this conclusion.[18]

(b). We also believe it immaterial that Commodity's Charter Act establishes criminal penalties, but not civil liability, for submission of false statements to the corporation. The Charter Act in Section 15m (a)–(d) specifies that certain actions shall be punishable by fine, imprisonment or both, and among these is the submission of false statements (15 U. S. C. 714m (a). Significantly, however, while Section 714m (e) thereafter provides that the general *penal* statutes will be inapplicable to the extent that they relate to offenses punishable under subsections (a)–(d), the Charter Act in no way purports to preclude utilization of the long-standing, and distinct, civil remedies available to the Government. Since the civil Act has general applicability, its reach would not be limited by failure specifically to provide for its coverage in legislation creating an agency of the Government which—as we contend in this case—would otherwise

[18] These realities manifested themselves to this Court in the case of the Fleet Corporation also. See *United States* v. *Walter*, 263 U. S. 15, where the Court sustained the validity of the 1918 amendment to the criminal Act and held additionally that a conspiracy to defraud the Fleet Corporation was covered by another provision of the Criminal Code, Section 37, which punished a conspiracy "to defraud the United States in any manner" (35 Stat. 1088). The Court stated that, while this corporation could not be considered the United States, "the contemplated fraud upon the corporation if successful would have resulted directly in a pecuniary loss to the United States, and even more immediately would have impaired the efficiency of its very important instrument." 263 U. S. at 18.

be covered.[19] Cf. *United States* v. *Borden Co.*, 308 U. S. 188, 198; *General Motors Acceptance Corp.* v. *United States*, 286 U. S. 49, 61–62; *Red Rock* v. *Henry*, 106 U. S. 596, 601; *Wood* v. *United States*, 16 Pet. 342, 362–363.

Nor is the court below on sound ground when, as "an additional argument" for inapplicability of the civil Act to Government corporations, it holds that, if such corporations were covered, any civil recovery would properly be had by the corporation itself, not by the United States, whereas under the False Claims Act recovery must be made in a suit by the United States (R. 19). This overlooks the fact that the United States, as the real party in interest, may bring suit in its own name to enforce claims growing out of the transactions of its corporate agencies (see, *supra*, pp. 26–27) and, furthermore, that Congress has specifically provided that suits on Commodity's claims may be brought in the name of the United States. 15 U. S. C. 714b (c).

B. THE FEDERAL HOUSING ADMINISTRATION IS A PART OF THE "GOVERNMENT OF THE UNITED STATES" WITHIN THE MEANING OF THE CIVIL FALSE CLAIMS ACT.

What has been said with respect to the status of a wholly-owned Government corporation as a part of

[19] *Pierce* v. *United States*, 314 U. S. 306, relied on by the court below, is clearly distinguishable in this regard. There, this Court refused to apply a false impersonation statute to a person masquerading as an employee of the Tennessee Valley Authority, where (1) Congress had omitted this penal statute in specifically enumerating in the TVA Act certain other federal penal statutes applicable to TVA operations (48 Stat. 68); and (2) the statute had been amended after the indictment to make it expressly applicable to Government corporations.

the "Government of the United States" under the civil False Claims Act has *a fortiori* application to the Federal Housing Administration. Not even a corporate shell distinguishes FHA from other agencies of the Executive, and this Court has recognized its substantive identity with the Government. *United States* v. *Emory*, 314 U. S. 423; *United States* v. *Summerlin*, 310 U. S. 414.

Structurally, the Federal Housing Administration is a non-incorporated federal agency created by the President pursuant to congressional authorization (48 Stat. 1246, as amended, 12 U. S. C. 1702). The agency is charged with the administration and execution of various federal housing programs, and the monies upon which those operations are based have their origin in Congressional appropriations.[20] The powers of the agency are vested in the Federal Housing Commissioner, an official appointed by the President with the advice and consent of the Senate (12 U. S. C. 1702). FHA, itself, is a constituent agency of the Housing and Home Finance Agency, and the

[20] The separate insurance funds which are the bases for FHA operation of the various housing programs stem either from Congressional appropriations (direct or through the Reconstruction Finance Corporation) or from Congressional authorization to transfer monies from an established fund to one that is newly created (see, *e. g.*, 12 U. S. C. 1702, 1705, 1708, 1737, 1747i, 1748a). Until the income from these funds was sufficient to cover operating expenses, allocations for this purpose were made from the United States Treasury through the RFC in accordance with the provisions of the National Housing Act and subsequent appropriations acts. Since July 1, 1937, a portion of the allocations, and since July 1, 1940, all allocations for expenses have been made from the various FHA insurance funds (see Tenth Annual Report (1956), Housing

Commissioner acts under the general supervision of the Administrator of that agency.[21]

FHA, in short, is as much a part of the "Government of the United States" as any other non-incorporated executive agency. This is not altered by the fact that the Commissioner in carrying out his statutory duties is "authorized, in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal" (12 U. S. C. 1702). Corporate status was not conferred thereby; rather, this proviso, which was added by an amendment to the Housing Act in 1935 (49 Stat. 722), was an exercise of Congress' "full power to endow the Federal Housing Administration with the government's immunity from suit or to determine the extent to which it may be subjected to the judicial process". *Federal Housing Administration* v. *Burr*, 309 U. S. 242, 244. See also *Federal Land Bank* v. *Priddy*, 295 U. S. 229; *Keifer &*

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and Home Finance Agency, p. 173). Despite the broad statutory power conferred upon the Commissioner to make expenditures, the actual amounts are carefully controlled by Congress through authorizations contained in its appropriations acts (see, *e. g.*, Independent Offices Appropriation Act, 1957 (70 Stat. 339, 354); Independent Offices Appropriation Act, 1956 (69 Stat. 199, 215); Independent Offices Appropriation Act, 1955 (68 Stat. 272, 297); First Independent Offices Appropriation Act, 1954 (67 Stat. 298, 315)).

[21] The Federal Housing Administration, together with other federal agencies having comparable functions, became a constituent agency within the Housing and Home Finance Agency pursuant to Section 1, Reorganization Plan No. 3, 1947 (61 Stat. 954, 5 U. S. C. note 133y–16). The Administration's powers, which were originally exercised by a Federal Housing Administrator (48 Stat. 1246), were, at the same time, transferred to the Federal Housing Commissioner—the newly created FHA head (Reorganization Plan No. 3, *supra*, Section 3).

Keifer v. Reconstruction Finance Corporation, 306 U. S. 381.

The effect of this "sue and be sued" provision on FHA's status was dealt with by the Court of Appeals for the District of Columbia Circuit in *Korman v. Federal Housing Administrator*, 113 F. 2d 743. There, the court, after noting initially that FHA was "constituted by Congress" with "no suspicion of a corporate identity", went on to hold that the provision subsequently added for suit by and against the Administrator did not confer upon FHA the status of a separate legal entity. The sole effect of the amendment, the court stated, was to preclude the assertion of sovereign immunity in suits against the agency, and, as "a matter of convenience", to permit the Administrator to appear in his official capacity to press the agency's claims (113 F. 2d at 746). Cf. *In re Wilson*, 23 F. Supp. 236, 240 (N. D. Tex.).[22]

Nor is it indicative of corporate status that FHA has been made subject to the auditing and budgetary provisions of the Government Corporation Control Act (59 Stat. 597, as amended, 31 U. S. C. 841, *et seq.*) A Congressional desire to provide "current financial control" (31 U. S. C. 841), not corporate structure, underlies that Act's inclusion of FHA (cf. 12 U. S. C. 1749a). This is borne out by the fact that, when the control Act was first passed in 1945 (59 Stat. 597), the FHA, which had been in existence for over ten years, was not included as a Government corporation.

[22] Also noteworthy is the fact that, in the Act creating FHA, Congress created the Federal Savings and Loan Insurance Corporation and specifically gave to it corporate attributes not conferred upon FHA (48 Stat. 1246, 1256).

It was not until 1948 that FHA was brought within the Act's coverage (62 Stat. 1283). In any event, as is the case with Commodity, *supra*, pp. 37–38, the control Act evidences Congressional awareness of the Government's financial stake in such agencies and an intimate concern with their operations and the disposition of federal monies. Insofar as the applicability of the civil False Claims Act is concerned, these factors strengthen, rather than diminish, the arguments in favor of identity with the "Government of the United States."[23]

II

A Fraudulent Claim for an FHA-Insured Loan Constitutes a "Claim" Against the United States Under the Civil False Claims Act, Prior to Default on the Loan and Indemnification of the Lender by the Government

As an additional ground for denying the Government relief in *McNinch*, the court below affirmed its agreement with decisions of the Courts of Appeals for Third and Fifth Circuits which had determined—over strong dissents in each case—that a fraudulent claim for an FHA-insured loan was not a "claim" against the United States within the meaning of the False Claims Act. See, *United States* v. *Tieger*, 234 F. 2d 589 (C. A. 3), certiorari denied, 352 U. S. 941; *United States* v. *Cochran*, 235 F. 2d 131 (C. A. 5), certiorari denied, 352 U. S. 941. The substance of those decisions was that the Act "deals only with

[23] As is the case with Commodity, false claims caused to be presented to FHA are subject to special criminal sanctions (see 18 U. S. C. 1010). The arguments advanced *supra*, pp. 39–40, as to unimpaired coverage by the generally applicable civil Act, apply here with equal force.

false claims upon the government for money or property" (see *Tieger, supra,* 234 F. 2d at 592) and that a claim to Government credit insurance cannot be so classified—at least in the absence of a loan default and consequent indemnification of the lender by the Government (*ibid.,* at 591).

We do not believe that the thrust of the Act, which speaks of "any claim," may be so limited. Undeniably, the FHA-loan claims constitute efforts—successful in *McNinch*—to "cheat the United States" by obtaining extensions of the Government's credit on spurious grounds. Literally read, as even *Tieger* would concede (234 F. 2d at 590), the Act's terms embrace the course of conduct by means of which the United States was so "cheated." In any event, the coverage which the Act seemingly calls for—and which is clearly needed—is not precluded by restricting the term "claim" to the "conventional meaning of demand for money or property" (234 F. 2d at 591). We show below that, even under this view, the statute reaches the fraudulent claim to Government credit insurance itself, and that default on the underlying loan does not—and, if practical relief is to be afforded, cannot—condition invocation of the Act's remedial provisions.

A. A CLAIM OF RIGHT TO GOVERNMENT CREDIT INSURANCE IS A "CLAIM" AGAINST THE GOVERNMENT WITHIN THE MEANING OF THE CIVIL FALSE CLAIMS ACT

1. *The Mechanics of the FHA Title I Loan Insurance Program*

Preliminary to any consideration of the reach of the False Claims Act in connection with *McNinch,* the

eleven fraudulent claims to Government credit insurance which were made by the South Carolina National Bank at respondents' instigation must be placed in proper context. For this purpose, a brief summary of Title I insurance procedures is appropriate.

Under Title I of the National Housing Act (48 Stat. 1246, as amended, 12 U. S. C. 1701, *et seq.*), the Federal Housing Commissioner is empowered, upon such terms and conditions as he may prescribe, to insure qualified lending institutions against losses sustained as a result of loans made by them for the purpose of financing alterations, repairs and improvements upon or in connection with real property. 12 U. S. C. 1703 (a). Pursuant to regulations authorized by the Act (12 U. S. C. 1703 (g)), a lending institution is first approved by FHA to grant loans eligible for insurance under Title I, and is given a contract of insurance under which the FHA agrees, generally, to indemnify the insured against losses sustained by it up to an aggregate amount equal to 10% of the total sums advanced by the institution in eligible loans and reported to FHA for insurance (12 U. S. C. 1703 (a); 24 CFR 200.2–200.3). A borrower desiring to obtain a Title I loan makes application to the lending institution, either directly or through contractors such as respondents, on an FHA form (FHA Title I Credit Application Property Improvement Loan) which provides for submission of facts as to the nature of the work to be done, the ownership of the property, and the borrower's credit status (24 CFR 200.3 (a)). The "entire transaction is the responsibility of the lending institution holding a contract of

insurance" and the "determination as to the eligibility of such loan for insurance, the approval of the borrower's credit and all other details of the transaction are handled by the lending institution, without prior examination or approval of the transaction by the Federal Housing Administration" (24 CFR 200.3 (a)). In determining whether the prospective borrower is a reasonable credit risk, the lending institution is permitted to rely on statements of fact made by the former (24 CFR 201.6 (b)). Within 31 days after the loan is made, the lending institution must report the details of the loan transaction to the FHA on an agency form provided for that purpose (24 CFR 200.3 (c)). After the details of the transaction have been reported to it, FHA computes the insurance premium which will be due and payable by the lending institution, records the transaction, and acknowledges the loan for insurance (24 CFR 200.3 (c)).[24]

Thus, it will be seen, upon FHA approval of a lending institution, the Government, as a practical matter, subjects its credit, and therefore its assets, to claims for loan insurance on transactions which the lender deems eligible under the Act. When FHA acknowledges coverage of a particular loan transaction, as it did in *McNinch*, it immediately undertakes a specific risk, becoming liable as an insurer for losses suffered

[24] If, after the loan is made, a lending institution which has acted in good faith discovers, *inter alia*, any material misstatements by the borrower, dealer, or others, the eligibility of the loan for insurance will not be affected. The discovery, however, must be promptly reported to the Commissioner (24 CFR 201.6 (b)).

by the lending institution on that loan.[25] This Governmental liability is a direct result of the credit request made by the loan applicant—a request which, as a practical matter, is directed against the assets of the United States, not the lender.

2. *The Scope of the False Claims Act.*

(a). In determining the reach of the civil provisions in relation to the fraudulent claims in question, the Act is to be accorded "the fair meaning of its intendment," and its purpose, which, was "to provide protection against those who would cheat the United States' ", is to be accorded due weight. *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 542, 544. The "penal" construction philosophy which finds expression in *Cochran, supra* (235 F. 2d at 133) is inappropriate—particularly so, since this Court has unmistakably rejected the "utmost strictness" ap-

[25] Although FHA insurance covers only 10% of the total amount of an approved lender's loans, the actual protection afforded would, in the absence of highly unusual circumstances, cover all transactions. This is evidenced by the fact that the ratio of claims paid to net proceeds of loans outstanding has averaged 2.06% in the period from 1934–1956. Tenth Annual Report (1956), Housing and Home Finance Agency, p. 90. See also Senate Report No. 1472, 83rd Congress, 2d Sess. Since the enactment of the Housing Act of 1954 (68 Stat. 590), only 90% of the loss suffered on an individual loan transaction may be indemnified by FHA (12 U. S. C., Supp. IV, 1703 (a)). This provision was added so as to instill "a measure of self-interest on the part of the lender in each loan in an amount sufficient to induce more careful lending operations." House Report No. 2271, 83rd Cong., 2d Sess., p. 64.

proach to the civil Act's terms (*Marcus* v. *Hess*, *supra*, at 540–541).

In its literal terms, the False Claims Act is directed against (*supra*, p. 3):

> Any person * * * who shall * * * cause to be presented, for * * * approval to or by any * * * [Federal] officer * * * any claim * * * against the Government * * * knowing such claim to be false * * * or who, for the purpose of obtaining * * * approval of such claim * * * uses * * * any false * * * certificate * * * knowing the same to contain any fraudulent or fictitious statement * * *.

As we read this unembellished language of the Act, the fraudulent claims in *McNinch* are squarely within its terms. The respondents "caus[ed] to be presented for * * * approval" a "claim" for credit "against the Government of the United States * * * knowing such claim to be false" (cf. R. 14).[26] See the dissenting opinion of Chief Judge Biggs in *United States* v. *Tieger*, 234 F. 2d 589, 594–595 (C. A. 3), certiorari denied, 352 U. S. 941.

Opposed to this reading of the Act are the majority opinions in *Tieger*, *supra*, and *United States* v. *Cochran*, 235 F. 2d 131 (C. A. 5), certiorari denied, 352

[26] The Act also applies to a person who knowingly makes a "claim" or "certificate" containing a "fraudulent or fictitious statement" for the purpose of "obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim" (*supra*, p. 3). Thus, respondents' false credit applications and credit reports (*supra*, pp. 9–11), as well as the claims made by the lender as a result of the applications, would be covered by the Act's express terms.

U. S. 941. In *Tieger*, the Third Circuit (234 F. 2d at 590–591) held that a proper construction of what would appear to be the Act's plain terms necessitates the insertion of an implied qualification restricting a "claim against the United States" to the "conventional meaning of demand for money or property". The court further held that, while access to the Government's credit constitutes a "commercially advantageous privilege", a fraudulent claim of right to that credit is "not a claim in normal business or legal usage" (234 F. 2d at 591). Subsequently, in *United States* v. *Cochran, supra*, also involving Title I insurance claims, the Fifth Circuit, with Judge Rives dissenting, reached a like result, improperly characterizing (235 F. 2d at 134) the Act as penal (see *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, and *United States ex rel. Ostrager* v. *New Orleans*, 317 U. S. 562).

In *Tieger*, reliance was placed on language used in *United States* v. *Cohn*, 270 U. S. 339, a criminal False Claims Act prosecution. There, the Court stated in *dicta* that the provisions of the criminal Act (270 U. S. at 345–346)

> * * * relating to the payment or approval of a "claim upon or against" the Government relates solely to the payment or approval of a claim for money or property *to which a right is asserted against the Government, based upon the Government's own liability to the claimant.* [Emphasis added.]

Since *Cohn*—which was distinguished on its facts in *Hess* (317 U. S. at 545)—involved a claim against property in which the Government had no interest,

its *dictum* is clearly inapposite here where a fraudulent claim was caused to be presented "against the Government based upon the Government's own liability to the claimant,"—seeking an extension, as of right, of a "commercially advantageous" benefit with a concomitant hazarding of the Government's credit.[28]

(b) However, even if it be assumed *arguendo* that, for purposes of the False Claims Act, the term "claim" is to be limited to a demand for "money or property", we believe that, according appropriate weight to commercial realities, the statutory language embraces a claim of right to Government credit insurance.

Unless the term "property" is to be restricted to tangible commodities alone, it would seem that that status cannot be denied the object of the *McNinch*

[27] In *Cohn*, the Court held the criminal provisions inapplicable to misstatements by means of which defendants obtained possession of nondutiable merchandise from customs officials. The Court pointed out that the false application sought "entry and delivery of nondutiable merchandise, as to which no claim is asserted against the Government, to which the Government makes no claim, and which is merely in the temporary possession of an agent of the Government for delivery to the person who may be entitled to its possession" (270 U. S. at 346). As Chief Judge Biggs stated in *Tieger*: "the ruling in the *Cohn* case [is not] controlling here for the question presented here was not in focus therein" (234 F. 2d at 595, n. 5).

[28] One court has stated that the "money or property" qualification is not an absolute one and that a claim for Government services (second-class mailing privileges) constituted a "claim" within the meaning of the False Claims Act, irrespective of whether those services are translatable into monetary equivalents. *United States ex rel. Rodriquez* v. *Weekly Publications, Inc., et al.*, 68 F. Supp. 767, 770 (S. D. N. Y.).

claims—the credit of the United States. Credit has central importance in our highly developed economy, which is substantially a credit economy. In private business spheres, credit status has long been treated as a property interest and is accorded by the law the protection due a valuable intangible property right.[29] Determination of the treatment to be accorded the Government's credit can be no less subject to considerations grounded in reality. On the basis of its credit, the Government is enabled to borrow vast amounts of money and at low interest rates. That same credit permits the Government to execute programs such as the one here in controversy, and to do so with an outlay of funds disproportionately small in comparison to the obligations undertaken. Even more than in the case of private businesses, the Government's credit is a commodity which is the subject of deliberate usage and careful control. The Housing Act itself represents an instance of a calculated Government utilization of this intangible "property" (cf. *United States* v. *Emory*, 314 U. S. 423, 433), and the manner in which the Government's credit is administered by FHA affects, not only the housing industry, but the entire economy as well. The Government, in

[29] See, *e. g.*, *Maytag Co.* v. *Meadows Mfg. Co.*, 45 F. 2d 299, 302 (C. A. 7), certiorari denied, 283 U. S. 843; *Aetna Life Ins. Co.* v. *Mutual Benefit Health & Accident Assn.*, 82 F. 2d 115, 118 (C. A. 8); *Meyerson* v. *Hurlbut*, 98 F. 2d 232, 234 (C. A. D. C.), certiorari denied, 305 U. S. 610; *Reporters' Assn.* v. *Sun Printing & Pub. Assn.*, 186 N. Y. 437, 79 N. E. 710; *Judevine* v. *Benzies-Montanye Fuel & Warehouse Co.*, 222 Wisc. 512, 520, 269 N. W. 295; *Hayes* v. *Press Co.*, 127 Pa. 642, 18 Atl. 331; *Froslee* v. *Lund's State Bank*, 131 Minn. 435, 155 N. W. 619.

short, has as substantial an interest in controlling the disposition of its credit as in controlling the use of its tangible assets.

The form in which the Government's credit was here sought—credit risk insurance—is itself a well-established commercial commodity. Millions of dollars are expended in premiums each year by lenders in business and industry to purchase the type of right to indemnity which the lending institution in this case obtained as a result of respondents' misrepresentations. In the area of credit life insurance alone, nearly 15 billion dollars of credit insurance, covering approximately one-half of the outstanding consumer credit, was in force at the end of 1955.[30] Protection afforded by this type of insurance is obviously of value to the insured even if there is no indemnifiable loss on any of the debts covered by the policy. The very existence of such insurance serves to free an insured's capital for other purposes by reducing the size of its loss reserves and improving its investment position by reducing the possibility of unexpected and damaging defaults in accounts receivable.[31] Accordingly, credit insurance, like insurance of other types (cf. *Burnet* v. *Wells*, 289 U. S. 670, 679), has been accorded recognition as a valuable and enforceable property right.[32]

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[30] *1956 Life Insurance Fact Book*, pp. 28–29.

[31] Cf. Paton, *Accountants' Handbook* (2d Ed.), pp. 248–256, 1500; Finney and Miller, *Advanced Principles of Accounting* (4th Ed.), pp. 118–141; Kester, *Principles of Accounting* (3rd Rev. Ed.), pp. 521–529.

[32] See, *e. g.*, *National Surety Co.* v. *Mutual Veneer Co.*, 66 F. 2d 88 (C. A. 6); *American Credit-Indemnity Co.* v. *E. R. Apt Shoe Co.*, 74 F. 2d 345 (C. A. 1); *American Credit Indemnity*

The Title I insurance here obtained has a special value to its recipients. The Government's reason for undertaking this loan guarantee program was to stimulate a flow of private loan capital which otherwise would not have been forthcoming. Cf. *United States* v. *Emory*, 314 U. S. 423, 433. By making its credit available as of right to approved lending institutions, borrowers such as respondents' customers are able to obtain for property improvement low interest, unsecured loans which would otherwise be unavailable. Similarly, dealers in respondents' position are enabled, as a practical matter, to obtain additional customers and to shift the risk of non-payment for their services to the Government. All this, it is to be noted, is at the expense of the credit extended by the United States. If the "property" concept is to have a relation to commercial reality, the credit insurance which the lending institution may claim as of right under Title I should be accorded that status.

The vulnerability of the Government's credit to those who would "cheat the United States" reinforces its property status for False Claims Act purposes. The FHA Title I insurance program is only one of a number of Government loan guaranty programs all of which have special eligibility requirements and, typically, offer advantages over commercial credit terms available to the public. These guaranty pro-

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Co. v. *Athens Woolen Mills*, 92 Fed. 581 (C. A. 6); *Tebbets* v. *Mercantile Credit Guarantee Co.*, 73 Fed. 95 (C. A. 2); *Hare & Chase* v. *National Surety Co.*, 49 F. 2d 447 (S. D. N. Y.), affirmed, 60 F. 2d 909 (C. A. 2), certiorari denied, 287 U. S. 662; *People* v. *Rose*, 174 Ill. 310, 51 N. E. 246; *People* v. *Mercantile Credit Guarantee Co.*, 166 N. Y. 416, 60 N. E. 24.

grams make up a substantial part of the Government's financial dealings with its citizens and provide an area of maximum opportunity for those who would "cheat the United States" by misrepresenting their eligibility for loan guaranties.[33] FHA Title I loans form only a small part of this overall guaranty picture, yet under that program alone the recent annual average of property improvement loans granted has been over one million and the average total amounts, approximately $700,000,000 annually (Tenth Annual Report (1956), Housing and Home Finance Agency, pp. 40, 59),[34] The vulnerability of the Government's credit under such programs has been deliberately limited by statute and regulation to enumerated types of loans and to borrowers meeting specified qualifications. When, as a result of fraud, the United States is induced to pledge its credit for the benefit of a person falsely claiming eligibility, the Government is "cheated" in that its property—which

[33] A by no means exhaustive list includes the loan guaranties made by the Export-Import Bank (12 U. S. C. 635); insurance of housing loans by the Housing and Home Finance Administration (12 U. S. C. 1701g); mortgage insurance by the Federal Housing Administration (12 U. S. C. 1706c; 1707–1709, 1744); loan guaranties to small business by the Small Business Administration (15 U. S. C., Supp. IV, 636); loan guaranties to veterans by the Veterans Administration (38 U. S. C. 694, *et seq.*); and defense loan guaranties by the Treasury Department (50 U. S. C. App. 2091, *et seq.*).

[34] At the end of 1956, the net amount of outstanding FHA loan insurance, under all programs administered by that agency, was in excess of $20 billion. Of this amount, over $15 billion represented home mortgage insurance, $4 billion property mortgage insurance, and $1 billion property improvement loan insurance (Tenth Annual Report (1956), Housing and Home Finance Agency, p. 39).

includes the use of its credit—has been obtained by fraudulent means.

B. DEFAULT ON A LOAN WHICH THE GOVERNMENT HAS BEEN FRAUDULENTLY INDUCED TO INSURE IS NOT A CONDITION PRECEDENT TO APPLICABILITY OF THE FALSE CLAIMS ACT

Implicit in the *Tieger* rule, *supra*, is the assumption that recourse to the remedial provisions of the False Claims Act must await a default on the particular loan which the Government has been fraudulently induced to insure (234 F. 2d at 590–591). Yet, once it is established that a claim of right to Government credit insurance is a "claim upon or against the the Government of the United States"—or, more narrowly, against the Government's "property"—it becomes immaterial whether a loan on which insurance was fraudulently procured is subsequently defaulted. Analytically, the statutory language, even as qualified, makes such a credit claim a "claim" in and of itself. Moreover, in considering this claim of right and its consequences, it must be remembered that the Government's credit is irrevocably committed once FHA insurance is obtained. (See p. 10, *supra*, fn. 6.) Thus, when a default occurs, payment by the United States is required. This payment is not the consequence of an independent obligation which arises at the time of default; rather, it is the fulfillment of a previously undertaken commitment to indemnify the lender against loss in the particular loan transaction insured.

Default, in short, cannot be considered a determinative factor in activating the civil Act's provisions. The sole effect of a subsequent default is a practical

one, *i. e.*, it gives rise to an out-of-pocket loss and specific ascertainable damages. But, insofar as statutory coverage is concerned, no significance attaches to this fact. While a defrauding claimant must cause injury to the Government, an ascertainable pecuniary loss is not a prerequisite to liability under the civil False Claims Act. The statute provides a civil remedy against a person who makes a false "claim upon or against the Government," and liquidated damages may be recovered even though no monetary loss is suffered. This facet of the Act has been twice affirmed by the Court. See *Rex Trailer Co., Inc.* v. *United States*, 350 U. S. 148, 153; *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537; see also, *United States* v. *Rohleder*, 157 F. 2d 126, 129 (C. A. 3); *United States* v. *Rainwater*, 244 F. 2d 27, 28 (C. A. 8). Thus, in *McNinch*, the absence of a loan default, and a consequent monetary outlay, would not, in and of itself, preclude recourse to the Act.

The absence of a direct pecuniary loss on these loan transactions does not, however, negate injury to the Government. The Government's property interest in the proper use of its credit was abused in the extension of that credit to individuals who were not "reasonable credit risk[s]" (*infra*, p. 65; see also, *supra*, pp. 46–47). Moreover, the administration of its Title I home improvement program was impaired. As shown, *supra*, p. 46, the provisions of the National Housing Act authorize the FHA to insure repayment of only 10 percent of the total value of otherwise eligible loans. Accordingly, respondents' fraudulently procured Title I loans resulted in a

decrease in the amount of protection that would otherwise have been available to lenders proffering eligible loans. Clearly—minor though these amounts may here be—this was a frustration of the program's purposes. It was precisely this type of injury to the Government's interests that was dealt with by this Court in *Rex Trailer Co., Inc.* v. *United States*, 350 U. S. 148, 153–154; see also, *United States* v. *Weaver*, 207 F. 2d 796, 798 (C. A. 5). Thus, apart from any expense in investigating and prosecuting these frauds (cf. *Helvering* v. *Mitchell*, 303 U. S. 391, 401), and the reasonable inference of unjust enrichment to respondents (cf. *Rex Trailer Co., Inc.* v. *United States*, *supra*, at 153, n. 6), the Government's interests were substantially prejudiced. The resulting damages, of course, are not readily ascertainable. But it is the very purpose of the civil Act's liquidated damages provision to afford an appropriate recovery in such cases. In *Rex Trailer Co., Inc.*, *supra*, fraudulent purchases of Government surplus vehicles precluded, *inter alia*, sales to purchasers of the class intended by statute and promoted "undesirable speculation," resulting in "obvious * * * injury to the Government" (350 U. S. at 153). Dealing there with the problem of the Government's recovery under a statute "essentially the equivalent" of the False Claims Act, the Court stated that although the "damages resulting from this injury may be difficult or impossible to ascertain * * *, it is the function of liquidated damages to provide a measure of recovery in such circumstances" (350 U. S. at 153–154).

Moreover, any practical advantage to be derived from awaiting the occurrence of a default is far outweighed by the difficulties which such a delay would entail. If the Government, possessing evidence that it had been defrauded or misled into extending its credit, were required to sit idly by until such time as a default occurred, the efficacy of its damage remedy against the wrongdoer might be severely impaired if not destroyed. Loans insured pursuant to the provisions of the National Housing Act may have maturity dates in excess of thirty years.[3] In many cases, the Government's chances of recovering liquidated damages from the defrauder for the injuries it has incurred—injuries in no way dependent on default and an out-of-pocket loss (*supra*)—will be greatly reduced, if not eliminated, as a consequence of asset depletion in the interim between claim and default. This is peculiarly the case where it is the borrower who is the defrauding party. There, default itself is indicative of financial irresponsibility and of the futility of the Act's civil remedy. In such a case, if default is to condition civil relief, the Government would be required to forego its remedy until the happening of an event which itself marks the ineffectiveness of that remedy.

Another practical difficulty of delay in the Act's applicability until default is the evidentiary problem. The point in time at which the fraudulent claim is made may be separated from the time of default by many years (*supra*). Evidence relating to the

[3] See, *e. g.*, CFR 201.2 (d); 202.6 (a) (9); 203.8; 221.18; 243.10.

fraud that was once available may no longer be accessible—particularly, where, as here, the fraud concerns the credit standing of the borrower at the time of his loan application. These evidentiary problems, moreover, are not one-sided. They may prejudice either the Government or—where they bear on exculpatory matters—the party against whom recovery is sought.

Such practical considerations reinforce our prior arguments as to the irrelevance of default in determining the availability of the remedial provisions of the False Claims Act. The Act is violated by the fraudulent claim against the Government's credit; the injuries occasioned thereby are to be redressed through the liquidated damages provision of the Act, irrespective of default.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the court below be reversed with directions to reinstate the judgments of the District Courts in the *Cato* and *Toepleman* cases and to order a determination on the merits by the trial court in *McNinch*.

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FEBRUARY 1958.

APPENDIX

1. Title I of the National Housing Act (48 Stat. 1246, as amended, 12 U. S. C. 1703) provides in part:

INSURANCE OF FINANCIAL INSTITUTIONS

(a) [12 U. S. C., Supp. IV, 1703 (a)] The Commissioner is authorized and empowered upon such terms and conditions as he may prescribe, to insure banks, trust companies, personal finance companies, mortgage companies, building and loan associations, installment lending companies and other such financial institutions, which the Commissioner finds to be qualified by experience or facilities and approves as eligible for credit insurance, against losses which they may sustain as a result of loans and advances of credit, and purchases of obligations representing loans and advances of credit, made by them on and after July 1, 1939, and prior to September 30, 1956, for the purpose of financing alterations, repairs, and improvements upon or in connection with existing structures, and the building of new structures, upon urban, suburban, or rural real property (including the restoration, rehabilitation, rebuilding, and replacement of such improvements which have been damaged or destroyed by earthquake, conflagration, tornado, hurricane, cyclone, flood, or other catastrophe), by the owners thereof or by lessees of such real property under a lease expiring not less than six months after the maturity of the loan or advance of credit. In no case shall the insurance granted by the Commissioner under this section to any such financial institution on loans, advances of credit, and purchases made by such financial institution for such purposes on and after July 1, 1939, exceed 10 per centum of the total amount of such loans, advances of credit,

and purchases: *Provided*, That with respect to any loan, advance of credit, or purchase made after the effective date of the Housing Act of 1954, the amount of any claim for loss on any such individual loan, advance of credit, or purchase paid by the Commissioner under the provisions of this section to a lending institution shall not exceed 90 per centum of such loss. The aggregate amount of all loans, advances of credit, and obligations purchased, exclusive of financing charges, with respect to which insurance may be heretofore or hereafter granted under this section and outstanding at any one time shall not exceed $1,750,000,000.

After the effective date of the Housing Act of 1954, (i) the Commissioner shall not enter into contracts for insurance pursuant to this section except with lending institutions which are subject to the inspection and supervision of a governmental agency required by law to make periodic examinations of their books and accounts, and which the Commissioner finds to be qualified by experience or facilities to make and service such loans, advances or purchases, and with such other lending institutions which the Commissioner approves as eligible for insurance pursuant to this section on the basis of their credit and their experience or facilities to make and service such loans, advances or purchases; (ii) only such items as substantially protect or improve the basic livability or utility of properties shall be eligible for financing under this section, and therefore the Commissioner shall from time to time declare ineligible for financing under this section any item, product, alteration, repair, improvement, or class thereof which he determines would not substantially protect or improve the basic livability or utility of such properties, and he may also declare ineligible for financing under this section any item which he determines is especially subject to selling abuses; and (iii) the Commissioner is authorized and directed, by such regulations or

procedures as he shall deem advisable, to prevent the use of any financial assistance under this section (1) with respect to new residential structures that have not been completed and occupied for at least six months, or (2) which would, through multiple loans, result in an outstanding aggregate loan balance with respect to the same structure exceeding the dollar amount limitation prescribed in this subsection for the type of loan involved. * * *

(b) No insurance shall be granted under this section to any such financial institution with respect to any obligation representing any such loan, advance of credit, or purchase by it (1) if the amount of such loan, advance of credit, or purchase made for the purpose of financing the alteration, repair, or improvement of existing structures exceeds $2,500, or for the purpose of financing the construction of new structures exceeds $3,000; (2) if such obligation has a maturity in excess of three years and thirty-two days, except that such maturity limitation shall not apply if such loan, advance of credit, or purchase is for the purpose of financing the construction of a new structure for use in whole or in part for agricultural purposes; or (3) unless the obligation bears such interest, has such maturity, and contains such other terms, conditions, and restrictions as the Commissioner shall prescribe, in order to make credit available for the purposes of this subchapter: * * *

* * * * *

(f) [12 U. S. C., Supp. IV, 1703 (f)] The Commissioner shall fix a premium charge for the insurance hereafter granted under this section, but in the case of any obligation representing any loan, advance of credit, or purchase, such premium charge shall not exceed an amount equivalent to 1 per centum per annum of the net proceeds of such loan, advance of credit, or purchase, for the term of such obligation, and such premium charge shall

be payable in advance by the financial institution and shall be paid at such time and in such manner as may be prescribed by the Commissioner. The moneys derived from such premium charges and all moneys collected by the Commissioner as fees of any kind in connection with the granting of insurance as provided in this section, and all moneys derived from the sale, collection, disposition, or compromise of any evidence of debt, contract, claim, property, or security assigned to or held by the Commissioner as provided in subsection (c) of this section with respect to insurance granted on and after July 1, 1939, shall be deposited in an account in the Treasury of the United States, which account shall be available for defraying the operating expenses of the Federal Housing Administration under this section, and any amounts in such account which are not needed for such purpose may be used for the payment of claims in connection with the insurance granted under this section. * * *

(g) The Commissioner is authorized and directed to make such rules and regulations as may be necessary to carry out the provisions of this subchapter.

2. Federal Housing Commission regulations, in effect at the time the loans involved in this proceeding were made, provided in part (Note: for convenience, reference is to the latest edition of 24 CFR, there having been no applicable changes in the regulations):

SUBCHAPTER B—PROPERTY IMPROVEMENT LOANS

PART 201—CLASS 1 AND CLASS 2 PROPERTY IMPROVEMENT LOANS [REVISED]

* * * * * *

§ 201.1 *Definitions.* As used in the regulations in this part, the term:

* * * * * *

(e) "Insured" means a financial institution holding a contract of insurance under Title I of the act.

(f) "Loan" means an advance of funds or credit or the purchase of an obligation evidenced by a note.

* * * * *

(i) "Borrower" means one who applies for and receives a loan in reliance upon the provisions of the act and whose interest in the property to be improved is (1) a fee title, or (2) a life estate, or (3) an equitable interest under an instrument of trust or contract, or (4) a lease having a fixed term, expiring not less than six calendar months after the maturity of the loan.

* * * * *

§ 201.5 [Cumulative Pocket Supplement, 1957] *Credits and collections.*—(a) *Credit application:* Prior to making a loan the insured shall obtain a dated Credit Application executed by the borrower on a form approved by the Commissioner. A separate Credit Application is required for each loan made or note purchased.

(b) *Credit investigation.* The Credit application, supplemented by such other information as the insured deems necessary, must, in the judgment of the insured, clearly show the borrower to be solvent, with reasonable ability to pay the obligation and in other respects a reasonable credit risk. If, after the loan is made, an insured who acted in good faith discovers any material misstatements or misuse of the proceeds of the loan by the borrower, dealer, or others, the eligibility of the note for insurance will not be affected. However, the insured shall promptly report such discovery to the Commissioner.

* * * * *

(f) *Security.* The taking of security to secure the payment of a loan is left to the dis-

cretion of the insured unless specifically required by the Commissioner in accordance with the provisions of paragraph (e) of this section or of § 201.2 (d) (2) (iii). An insured may permit the substitution or subordination of security provided it can be shown when claim is made that at the time of such action the original security value was not impaired or reduced as a result of such action. Upon presentation of the facts the prior approval of the Commissioner may be obtained by the insured to any proposed substitution or subordination of security.

(g) *Collections.* The insured is required to service loans in accordance with acceptable practices of prudent lending institutions. In the event of default, the insured should have adequate facilities for contacting the borrower and otherwise exercise diligence in collecting the amount due. The insured is responsible to the Commissioner for proper collection efforts even though actual collection may be performed by an agent.

* * * * *

§ 201.6 [Cumulative Pocket Supplement, 1957] * * * (b) *Use of proceeds.* The proceeds of a loan shall be used only to finance alterations, repairs, and improvements upon real property or in connection with existing structures which substantially protect or improve the basic livability or utility of the property, and which are commenced in reliance upon the credit facilities afforded by Title I of the act.

(c) *Reliance on Credit Application.* An insured acting in good faith may, in the absence of information to the contrary, rely upon all statements of fact made by the borrower, which are called for by the borrower's Credit Application, in determining the eligibility of the loan.

* * * * *

§ 201.10 *Report of loans.* Loans shall be reported on the prescribed form to the Federal Housing Administration at Washington, D. C.,

within 31 days from the date of the note or date upon which it was purchased. Any loan refinanced as provided in § 201.9 shall likewise be reported on the prescribed form within 31 days from date of refinancing. In any case, the Commissioner may, in his discretion, accept a late report.

§ 201.11 [Cumulative Pocket Supplement, 1957] *Claims*—(a) *Claim application.* Claim for reimbursement for loss on an eligible loan shall be made on a form provided by the Commissioner and executed by a duly qualified officer of the insured. The claim shall be accompanied by the insured's complete credit and collection file pertaining to the transaction.

(b) *Claim after default.* Claim may be made after default provided demand has been made upon the debtor for the full unpaid balance of the note.

§ 201.13 [Cumulative Pocket Supplement, 1957] *Insurance charge*—(a) *Rate.* The insured shall pay to the Commissioner an insurance charge equal to sixty-five one-hundredths (0.65) of 1 percent per annum of the net proceeds of any eligible loan reported and acknowledged for insurance * * *

(b) *When payable.* Such insurance charge for the entire term of the loan shall be paid within 25 days after the date the Commissioner acknowledges receipt to the insured institution of the report of loan * * *

* * * * *

(d) *Refund or abatement.* There shall be no refund or abatement of any portion or installment of the insurance charge except:

(1) The charge on a refinanced note may be credited with the unearned portion of the charge on the original note;

(2) Insurance charges falling due after claim is filed or the note is prepaid in full;

(3) The charge paid on a loan or portion thereof found to be ineligible * * *.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1958

Supreme Court of the United States

OCTOBER TERM, 1956

No. 1038 146

THE UNITED STATES, PETITIONER,

versus

HOWARD A. McNINCH, d/b/a THE HOME COMFORT CO., ROSALIE McNINCH AND GARIS P. ZEIGLER, FREDERICK L. TOEPLEMAN, AND CATO BROS., INC., WILFRED R. CATO, WILLIAM R. CATO, AND MAGGIE L. DUNN (NEE: MAGIE L. STONE), RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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P. H. NELSON,
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Attorneys for Respondents, Howard A. McNinch, Rosalie McNinch and Garis P. Zeigler.

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STATEMENT

The respondents, Howard A. McNinch, d/b/a The Home Comfort Co., Rosalie McNinch and Garis P. Zeigler (Respondents in the *McNinch case*), have no objection to the Court granting the petition with respect to either Questions 1 or 2, as set forth on page 2 of the petition.

It is respectfully submitted, however, that this Honorable Court should not allow the petitioner "to reserve the right to brief and argue, with respect to the McNinch por-

tion of the case, the additional question whether a fraudulent claim for a government guarantee of an FHA home improvement loan constitutes a 'claim against the United States', under the civil False Claims Act, prior to default on the loan and indemnification of the lender by FHA.[1]

ARGUMENT

In the first place the petitioner has failed to set forth in the petition any reason why the Government should be given the right to brief and argue this additional question, and hence these respondents have no way to adequately present an argument in opposition thereto.

Furthermore, the very question which the Government is now attempting to reserve the right to argue has been squarely decided contrary to the Government's contention in *United States v. Tieger*, 234 F. (2d) 589 (C. A. 3), certiorari denied, 352 U. S. 941, and *United States v. Cochran*, 235 F. (2d) 131 (C. A. 6), certiorari denied, 352 U. S. 941.

Since the decision in the *Tieger* and *Cochran cases* the Court of Appeals for the Fourth Circuit has reached the same conclusion in this case.

Since all of the Courts of Appeal to which the question has been presented have resolved it contrary to the Government's contention we see no basis for granting the Government the right to again reargue this question, should the Court conclude to grant the petition for certiorari in the present cases.

---

[1] See Footnote 2, on page 2 of the Petition for Certiorari.

CONCLUSION

For the reasons herein set forth it is respectfully submitted that the Government's attempt to reserve the right to brief and argue, with respect to the *McNinch case*, the additional question set forth in Footnote 2, on page 2, of the Petition for Certiorari, should be denied.

Respectfully submitted,

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EDWARD W. MULLINS,

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In the

Supreme Court of the United States

October Term, 1956

No. ~~1038~~ 1416

THE UNITED STATES,

Petitioner

v.

HOWARD A. McNINCH, D/B/A THE HOME COMFORT CO., ROSALIE McNINCH AND GARIS P. ZEIGLER; FREDERICK L. TOEPLEMAN; AND CATO BROS., INC., WILFRED R. CATO, WILLIAM R. CATO, AND MAGIE L. DUNN (NEE: MAGIE L. STONE),

Respondents

Petition for a Writ of Certiorari to The United States Court of Appeals for the Fourth Circuit

BRIEF FOR CATO BROS., INC., ET AL., IN OPPOSITION

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June, 1957

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Respondents

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BRIEF FOR CATO BROS., INC., ET AL., IN OPPOSITION

QUESTION PRESENTED

For purpose of civil suit under the False Claims Act, do the criminal provisions of the Act, as enacted in 1863 and incorporated by the civil provisions of the Act in 1878, prohibit a false claim against Commodity Credit Corporation, a wholly owned government corporation organized in 1948?

STATEMENT

Initially, it should be called to the Court's attention that the petition presented by the Solicitor General is, or should

be, a petition for writs of certiorari in three separate cases arising from decisions in three districts. In these circumstances, of course, this Court may grant or deny such a writ in any of the three cases. Concerning the *McNinch* case, this Court has recently denied certiorari in two cases expressly holding that requests for guarantees of Federal Housing Administration improvement loans were not claims within the meaning of the False Claims Act. See *United States* v. *Tieger*, 234 F. 2d 589 (3d Cir.), cert. denied, 352 U. S. 941 (1956); *United States* v. *Cochran*, 235 F. 2d 131 (5th Cir.), cert. denied, 352 U. S. 941 (1956). This alone is grounds for denying the petition in the *McNinch* case, even if this Court feels that a claim against the Federal Housing Administration may be a claim against the Government within the meaning of the False Claims Act.

For purposes of ruling on the petition in the *Cato* case, the only true statement of facts is to be found in the Findings of Fact of the District Court (R. 154). The pertinent portions of such findings are set out hereinbelow:

> "6. The Commodity Credit Corporation is a body corporate whose entire capital stock is subscribed by the United States of America, and it is an agency and instrumentality of the United States.
>
> "7. On August 3, 1948, the Commodity Credit Corporation and the defendant, Cato Bros., Incorporated, entered into a Lending Agency Agreement, under which the defendant, Cato Bros., Incorporated, was authorized to make loans to producers of 1948 crop cotton in accordance with the provisions of the said agreement.
>
> "8. During the year 1948, the defendants, Cato Bros., Incorporated, Wilfred R. Cato, William R. Cato and Magie L. Dunn (Nee: Stone), did submit to the Commodity Credit Corporation fifty-five (55) letters, transmitting a total of One Thousand One Hundred

Seventy-Six (1,176) notes representing loans made pursuant to the Lending Agency Agreement.

"9. The defendants, Cato Bros., Incorporated, Wilfred R. Cato, William R. Cato and Magie L. Dunn (Nee: Stone), transmitted to the Commodity Credit Corporation in thirty (30) of the aforementioned letters of transmittal a total of Seven Hundred Forty-eight (748) notes, in each of which letters there was at least one note covering cotton not actually produced by the person who signed the note as producer, and thus made and caused to be presented for payment to persons in the civil service of the United States, thirty (30) claims upon the Commodity Credit Corporation knowing the said claims to be false."

It should be noted here that few if any of the matters set forth on pages 4 through 5 of the petition were found to be facts by the District Court in the *Cato* case.

STATUTES INVOLVED

The matter quoted on page 3 of the petition is not the False Claims Act nor is it a statute involved in this case. Counsel for petitioner merely has copied Section 231 of Title 31 of the United States Code which, as pointed out in *United States* ex rel *Kossler* v. *Mercur Corporation*, 83 F. 2d 178, 180 (2d Cir.), cert. denied, 299 U. S. 576 (1936), is not a true statement of the law.

In reality, the so-called False Claims Act is composed of two statutes, Sections 3490 and 5438 (R.S. 1878). The first of these is a civil statute, Section 3490 of the Revised Statutes of 1878, under which this suit was brought; the second is a criminal statute, Section 5438 of the Revised Statutes of 1878, which was adopted in 1863 and is in part incorporated by reference in Section 3490. These two statutes have never been integrated, and this factor is very important to a proper consideration of the petition. The

third relevant statute is Section 35 of the Criminal Code as amended in 1918, which is the successor to Section 5438 of the Revised Statutes of 1878. The pertinent parts of these statutes are set forth below:

Section 3490 of the Revised Statutes of 1878, 12 Stat. 696, 698:

> "Sec. 3490 — Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty eight, Title "CRIMES", shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

Section 5438 of the Revised Statutes of 1878, 12 Stat. 696, 698:

> "Sec. 5438 — Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval services of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, . . . shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars."

Section 35 of the Criminal Code, as amended October 23, 1918, 40 Stat. 1015, the italicized words being added by the amendment:

"Section 35 — Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval services of the United States, or any department thereof, *or any corporation in which the United States of America is a stockholder*, any claim upon or against the Government of the United States, or any department or officer thereof, *or any corporation in which the United States of America is a stockholder*, knowing such claim to be false, fictitious, or fraudulent . . . shall be fined not more than $10,000.00, or imprisoned not more than ten years or both. . . ."

As will be noted, the last quoted statute contains a reference to claims against government corporations. This reference did not appear until the amendment of 1918.

REASONS FOR DENYING THE WRIT

The decision of the court below is plainly correct.

Respondents were sued under a civil statute enacted in 1878 incorporating certain provisions of a criminal statute enacted in 1863. The pertinent incorporated part of the criminal statute, Section 5438, penalized any ". . . claim upon or against the Government of the United States, or any department or officer thereof. . . ." No mention was made of a claim against a government corporation. This Court already has held specifically that identical language when used before 1884 did not embrace a government corporation. In *Pierce* v. *United States*, 314 U. S. 306 (1941), this Court held that a person who pretended to be an employee of TVA, a wholly owned government corporation and an agency and instrumentality of the United States, could not be prosecuted under a statute enacted in 1884 making it a crime fraudulently to ". . . pretend to be an officer or employee acting under . . . the authority of the

United States or any department, or any officer, of the government thereof. . . ." (Emphasis added)

Mr. Justice Reed stated for this Court at pages 310 through 311 of the opinion as follows:

> "The statute in effect at the time of the commission of the alleged offenses did not speak of pretenses of acting under authority of corporations owned or controlled by the United States. It was passed in 1884 before the United States owned or controlled corporations operating hotels, boat lines or generating plants. The amendments, subsequent to the occasions fixed by the indictment, extended its scope first to the Home Owners Loan Corporation (citing authority), and later to all corporations owned or controlled by the United States, 52 Stat. at L. 82, Chap. 37. These legislative extensions of the scope of the act were in accord with the growing importance of the administrative corporation, but a comparable judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness."

As pointed out in this Court's opinion in *United States* ex rel *Marcus* v. *Hess*, 317 U. S. 537, 542 (1942), the Court is concerned with the construction of a criminal statute here, since the provisions of Section 5438 incorporated by Section 3490 must be construed uniformly in either a civil suit under the latter section, as here, or in a criminal prosecution under the former section.

In a dictum appearing at page 312 of the opinion in *Pierce*, this Court recognized that Section 5438 (referred to in the opinion as Section 35 of the Criminal Code) was in like manner extended to cover government corporations by the amendment of 1918. As always conceded by the petitioner, and soundly supported by opinions of this Court,

the 1918 extension of Section 5438 to cover government corporations did not in like manner extend the scope of Section 3490, the civil statute under which this suit was brought, since amendment of the incorporated statute could not affect the scope of the incorporating statute. See *Kendall* v. *United States*, 12 Pet. (37 U. S.) 524 (1830); In re *Heath*, 144 U. S. 92 (1892); *Hassett* v. *Welch*, 303 U. S. 303 (1937); *United States* ex rel *Kessler* v. *Mercur Corporation*, 83 F. 2d 178, (2d Cir.), cert. denied, 299 U. S. 576 (1936). The incorporating statute, Section 3490, has never been amended since 1878 when it first incorporated part of Section 5438.

On page 12 of the petition, the Solicitor General has referred to three cases in which it is contended government corporations were held to be identical with the Government of the United States. Without going into particulars here, since all such cases turn upon the particular facts presented, we now cite a number of cases in which this Court has held that a government corporation is an entity, separate and distinct from the United States and is to be treated as such, although such a corporation may be financed, controlled and managed by the United States. *United States* v. *Strang*, 254 U. S. 491, 493 (1920); *Sloan Shipyards Corp. et al* v. *United States Shipping Board E. F. Corp.*, 258 U. S. 549 (1921); *United States* ex rel *Skinner Eddy Corp.* v. *McCarl*, 275 U. S. 1 (1927); *United States Shipping Board E. F. Corp.* v. *Harwood*, 281 U. S. 522 (1929); *The Bank of the United States* v. *The Planters Bank of Georgia*, 9 Wheat. 904 (1824); *The Lake Monroe*, 250 U. S. 246 (1918); *Clallam County* v. *United States*, 263 U. S. 341 (1923).

In addition to this Court's controlling decision in the *Pierce* case, *supra*, the extensive and clear legislative history of Sections 3490 and 5438 reveals that a government corporation was not included within their scope in 1878.

Not until the 1918 amendment of Section 5438 (then appearing as Section 35 of the Criminal Code) did this section specifically include an offense against government corporations. By this amendment such an inclusion was made. See 40 Stat. 1015, and page 5, *supra*. Upon adoption of the 1918 amendment, the proponents of the amendment in Congress stated that it served to re-enact the provisions of Section 35 of the Criminal Code (formerly Section 5438):

> ". . . so that it will include all the offenses heretofore contained therein and an offense against 'any corporation in which the United States of America is a stockholder.' . . . The only amendments to the existing law are the extension of the penalty of this act to false and fraudulent claims that are presented against corporations in which the United States is a stockholder. . . . That as I recall it was all there was to this bill as it came from the Senate, and to it was subsequently attached the rest of § 35 as amended to extend the law to false and fraudulent claims made against a corporation in which the United States is a stockholder." H. R. Rep. 668, 65th Cong. 2d Sess. (1918); 56 Cong. Rec. 11,118-11,119 (1918.)

Congress declared it was extending the scope of the statute, and in four of its decisions this Court has specifically declared that the amendment of 1918 *extended* the scope of Sect. 5438 to cover government corporations and that even as extended the section covered only those corporations so controlled and managed by the Government as to be agencies and instrumentalities of the Government. See *United States* v. *Bowman*, 260 U. S. 94 (1922); *United States* v. *Walter*, 263 U. S. 15, 17 (1923); *United States* v. *Strang*, 254 U. S. 491, 493-494 (1920); *United States* v. *Bramblett*, 348 U. S. 503, 506 (1955) (footnote).

It is authoritatively settled by opinions of this Court, and

conceded by petitioner, that liability attaches under Section 3490 only upon commission of acts prohibited by Section 5438, as that section read and was understood in 1878. See *United States* ex rel *Marcus* v. *Hess*, 317 U. S. 537 (1942); *United States* ex rel *Brensilber* v. *Bausch and Lomb Optical Company*, 131 F. 2d 545 (2d Cir. 1942), affirmed, 320 U. S. 711 (1943); *United States* v. *Rohleder*, 157 F. 2d 126 (3d Cir. 1946).

Respondents think it abundantly clear from this Court's decision in the *Pierce* case, *supra*, from the legislative history of the two sections involved and from this Court's decisions based on such legislative history that not until 1918 did Section 5438 of the Revised Statutes of 1878 proscribe a claim against a government corporation. Since this is clear, no liability could attach under Section 3490 which incorporates only the provisions of Section 5438 as they stood in 1878.

Petitioner places great reliance upon this Court's decision in *United States* ex rel *Marcus* v. *Hess*, 317 U. S. 537 (1942). Petitioner contends this case is controlling, since it contends that government funds are expended and that is all that is necessary. It is apparent, however, that whether or not government funds are expended as we view the case in 1957 is immaterial, since in 1878 Section 5438 did not encompass a claim against a government corporation. The *Hess* case merely sets down a rule of construction to be used where there is ambiguity or uncertainty as to the application of the statute. In this case, there is no uncertainty. Congress has said that this statute did not cover a government corporation until 1918, and this Court has recognized this in the cases cited above. In these circumstances, a rule of construction is not necessary, since the meaning and scope of the statute are clear. As pointed out in the decisions cited

on page 7, *supra*, a government corporation is no mere bookkeeping device to be ignored by Congress or the courts.

Petitioner has pointed out that numerous other cases are pending involving this question, in which some $4,000,000.00 in damages are claimed. The decision of this case will have little, if any, bearing upon such claims for damages, since the Government will always be free to bring a common-law action for such damages without the aid of the present statute. If respondents position is sustained before this Court, and the petition is denied, the remedy for the Government if it wishes to recover penalties in the future is a simple one. All that is needed is appropriate action by Congress.

Concerning the conflict in circuits which has arisen, respondents respectfully submit that certiorari should be denied in this case and, upon proper application, granted in the *Rainwater* case and that decision reversed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied in the *Cato* case.

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Christian, Barton, Parker & Boyd
Charles W. Laughlin
Of Counsel

June, 1957.

In the

Supreme Court of the United States

October Term, 1957

No. 146

THE UNITED STATES,

Petitioner

v.

HOWARD A. McNINCH, D/B/A THE HOME COMFORT CO., ROSALIE McNINCH AND GARIS P. ZEIGLER; FREDERICK L. TOEPLEMAN; AND CATO BROS., INC., WILFRED R. CATO, WILLIAM R. CATO, AND MAGIE L. DUNN (NEE: MAGIE L. STONE),

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION TO TRANSFER CASE FROM SUMMARY CALENDAR

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February, 1958

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Petitioner

v.

HOWARD A. McNINCH, D/B/A THE HOME COMFORT CO., ROSALIE McNINCH AND GARIS P. ZEIGLER; FREDERICK L. TOEPLEMAN; AND CATO BROS., INC., WILFRED R. CATO, WILLIAM R. CATO, AND MAGIE L. DUNN (NEE: MAGIE L. STONE),

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION TO TRANSFER CASE FROM SUMMARY CALENDAR

Respondents in the above entitled cause, Howard A. McNinch, D/B/A The Home Comfort Co., Rosalie McNinch and Garis P. Zeigler; and Cato Bros., Incorporated, Wilfred R. Cato, William R. Cato and Magie L. Dunn (nee: Maggie L. Stone) move this honorable Court to transfer this cause from the summary calendar and permit one hour's time for argument by respondents, such time to be divided between two counsel.

In support of this motion the following facts are set forth:

1. This cause involves three separate cases arising from decisions in three separate districts and involving three distinct, separate and fundamentally distinguishable fact situations. The cases have never been tried or argued together.

2. In the case of *United States* v. *Howard McNinch, D/B/A The Home Comfort Company, Rosalie McNinch and Garis P. Zeigler,* counsel for the respondent will desire to argue primarily, if not solely, the question of whether or not a "claim" was presented against the government within the meaning of the False Claims Act.

3. In the case of *United States* v. *Cato Bros., Incorporated, Wilfred R. Cato, William R. Cato and Magie L. Dunn (nee: Magie L. Stone),* counsel for the respondent will desire to argue primarily, if not solely, the question of whether or not the False Claims Act applies to a government corporation, assuming a claim was made against such a corporation.

4. In the Court below, in neither case did counsel for the respective respondents mentioned above brief, argue or urge upon the court the point desired to be argued primarily by counsel for the other respondent.

5. If the case is allowed to remain upon the summary calendar, only one counsel will be heard for all respondents and only one-half hour will be allowed for the entire argument.

6. In this event, at least one of the respondents mentioned above will be prejudiced, since counsel arguing the case will have to argue a point with which he is not familiar

and with which he is not primarily concerned in his particular case. Furthermore, it is felt that the Court may not be fully appraised of both points if but one counsel is permitted to argue and but one-half hour is permitted for argument.

7. The Solicitor General, petitioner in this cause, will not oppose the granting of this motion.

HOWARD A. MCNINCH, D/B/A THE HOME COMFORT CO., ROSALIE MCNINCH and GARIS P. ZEIGLER

By Counsel

EDWIN P. GARDNER, *of Counsel*

CATO BROS., INCORPORATED, WILFRED R. CATO, WILLIAM R. CATO and MAGIE L. DUNN (NEE: MAGIE L. STONE)

By Counsel

A. C. EPPS, *of Counsel*

CERTIFICATE OF SERVICE

We, Edwin P. Gardner, counsel of record for the respondent Howard A. McNinch, D/B/A The Home Comfort Co., Rosalie McNinch and Garis P. Zeigler, and A. C. Epps, counsel of record for the respondent Cato Bros., Incorporated, Wilfred R. Cato, William R. Cato and Magie L. Dunn (nee: Magie L. Stone), do hereby certify that the foregoing motion was served upon petitioner by depositing a true and complete copy thereof in a United States post office box, with first class postage prepaid, addressed to the Solicitor General, Department of Justice, Washington 25, D. C., in conformity with Rule 33(2) of this Court on the

..... day of ....., 1958.

.....

EDWIN P. GARDNER

.....

A. C. EPPS

In the

Supreme Court of the United States

October Term, 1957

No. 146

THE UNITED STATES,

Petitioner

v.

HOWARD A. McNINCH, D/B/A THE HOME COMFORT CO., ROSALIE McNINCH AND GARIS P. ZEIGLER; FREDERICK L. TOEPLEMAN; AND CATO BROS., INC., WILFRED R. CATO, WILLIAM R. CATO, AND MAGIE L. DUNN (NEE: MAGIE L. STONE),

Respondents

On Writ of Certiorari to The United States Court of Appeals for the Fourth Circuit

BRIEF FOR CATO BROS., INC., WILFRED R. CATO, WILLIAM R. CATO, AND MAGIE L. DUNN (NEE: MAGIE L. STONE)

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BRIEF FOR CATO BROS., INC., WILFRED R. CATO, WILLIAM R. CATO, AND MAGIE L. DUNN (NEE: MAGIE L. STONE)

STATUTES INVOLVED

Petitioner has set forth on page No. 3 of its brief a "statute" that does not and never did exist. Since respondents are certain that the Solicitor General's Office has no desire to mislead this Court, such a critical misstatement of the statutes involved can indicate only one of two things—

either complete carelessness or a complete misunderstanding of the issues involved.

As pointed out in respondents' brief in opposition to the petition for certiorari, there are two statutes involved in this case.* An appreciation of this fact is not a mere formal matter but is absolutely vital to an understanding of the substantive matters presently before this Court, since all language to be construed appears in the criminal statute as opposed to the civil statute.

The False Claims Act is composed of Sections 3490 and 5438 of the Revised Statutes of 1878. The former is a civil statute and the latter is a criminal statute. These two statutes have never been integrated, and Section 3490 has never been acted upon by Congress since its original adoption.

The pertinent parts of these statutes are set forth below:

Section 3490 of the Revised Statutes of 1878, 12 Stat. 696, 698:

> "Sec. 3490 — Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty eight, Title "CRIMES", shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

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* This fact has been pointed out to the attorneys for the Government in respondents' briefs in the trial court and in the Circuit Court of Appeals. Nevertheless, the statutes were misquoted by these attorneys in the Circuit Court of Appeals, in the petition to this Court and now in the brief on the merits.

Section 5438 of the Revised Statutes of 1878, 12 Stat. 696, 698:

> "Sec. 5438 — Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval services of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, . . . shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars."

A third statute also is important. In 1918, Section 5438, as reenacted, was amended to read as follows, the italicized portion being added by the amendment. Section 35, Criminal Code, 40 Stat. 1015:

> "Section 35—Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval services of the United States, or any department thereof, *or any corporation in which the United States of America is a stockholder*, any claim upon or against the Government of the United States, or any department or officer thereof, *or any corporation in which the United States of America is a stockholder*, knowing such claim to be false, fictitious, or fraudulent . . . shall be fined not more than $10,000.00, or imprisoned not more than ten years or both. . . ."

QUESTION PRESENTED

As a matter of law, is the Commodity Credit Corporation, a wholly-owned government corporation, the Government of the United States within the criminal provisions of Sec-

tion 5438 of the Revised Statutes of 1878 so as to impose penalties for claims against the corporation under the provisions of Section 3490 of the Revised Statutes of 1878?

STATEMENT OF THE CASE

The pertinent facts for a decision of the *Cato* case are found in the findings of fact made by the District Court (R. 72-73). The pertinent portion of said findings is set out below:

> "6. The Commodity Credit Corporation is a body corporate whose entire capital stock is subscribed by the United States of America, and it is an agency and instrumentality of the United States.
>
> "7. On August 3, 1948, the Commodity Credit Corporation and the defendant, Cato Bros., Incorporated, entered into a Lending Agency Agreement, under which the defendant, Cato Bros., Incorporated, was authorized to make loans to producers of 1948 crop cotton in accordance with the provisions of the said agreement.
>
> "8. During the year 1948, the defendants, Cato Bros., Incorporated, Wilfred R. Cato, William R. Cato and Magie L. Dunn (Nee: Stone), did submit to the Commodity Credit Corporation, fifty-five (55) letters, transmitting a total of One Thousand One Hundred Seventy-Six (1,176) notes representing loans made pursuant to the Lending Agency Agreement.
>
> "9. The defendants, Cato Bros., Incorporated, Wilfred R. Cato, William R. Cato and Magie L. Dunn (Nee: Stone), transmitted to the Commodity Credit Corporation in thirty (30) of the aforementioned letters of transmittal a total of Seven Hundred Forty-eight (748) notes, in each of which letters there was at least one note covering cotton not actually produced by the person who signed the note as producer, and thus

made and caused to be presented for payment to persons in the civil service of the United States, thirty (30) claims upon the Commodity Credit Corporation knowing the said claims to be false.

"10. The cotton represented by the aforesaid improper notes was held by the Commodity Credit Corporation for an unreasonably long time, during which time it could have disposed of the said cotton at a profit.

"11. The Commodity Credit Corporation failed to accept the offer of the defendants to repurchase the cotton at the price paid for the cotton by the said Corporation."

SUMMARY OF ARGUMENT

This case involves solely the construction of a statute adopted in 1878, and although this is a civil suit, the impact of the civil statute involved is controlled entirely by construction of a criminal statute. Whether or not the Commodity Credit Corporation is or is not a part of the Government of the United States as that term would be understood if used today is of no consequence or probative value in determining the questions now before the Court. The Court must discover and follow the meaning of the terms of the statute as used in the year 1878.

From the authorities and documents referred to below, it is crystal clear to respondents that this terminology as used in the year 1878 did not include a government corporation. For this reason, considerations of present day thought upon the subject reviewing present day statutory enactments, and present day decisions are not in point, unless such authorities purport to discern and comment upon the intent of Congress in 1878 in connection with this particular Act. The question is not whether the Congress or this Court might consider a government corporation, be it the Com-

modity Credit Corporation or some other corporation, a part of the Government of the United States if that term were used at any point after 1878 in any other statute. Rather, the question is whether or not Congress in 1878 in enacting the False Claims Act considered and intended that a government corporation be included within the term "Government of the United States". Respondents submit that Congress did not so intend.

ARGUMENT

I.

A False Claim Against Commodity Credit Corporation, a Wholly-Owned Government Corporation, Is Not a False Claim Against the Government of the United States Within the Meaning of Section 5438 of the Revised Statutes of 1878; Hence No Penalties Can Be Exacted Under Section 3490 of the Revised Statutes of 1878.

The Bill of Complaint (R. 55) filed by the United States in this matter charged that respondents made certain false claims against the Commodity Credit Corporation, and the District Court found as a fact that such false claims were made only against the Commodity Credit Corporation (R. 73). On motion for summary judgment, and in its conclusions of law (R. 69, 74), the District Court held as a matter of law that a false claim against the Commodity Credit Corporation is a false claim against the Government of the United States within the meaning of Section 3490 of the Revised Statutes of 1878.

On appeal, the United States Court of Appeals for the Fourth Circuit reversed this decision, 242 F. 2d 359, and held that a claim against the Commodity Credit Corporation is not a claim against the Government of the United States within the meaning of the False Claims Act.

For the reasons set out below, respondents respectfully submit that the decision of the Fourth Circuit should be affirmed.

A.

Respondents Are Liable to the United States Under Section 3490 Only If They Committed Acts Prohibited by Section 5438 as the Latter Section Read in 1878.

This suit was brought by the United States as plaintiff under the provisions of Sections 3490 and 5438 of the Revised Statutes of 1878. The District Court and the Fourth Circuit recognized, and petitioner apparently has conceded, that these sections are the law of this case and that the amendments of Section 5438 made after 1878 can have no direct bearing on this case. While this fact apparently is not in dispute here, respondents feel that an expose of the reasoning underlying this conclusion is necessary in order for this Court to view this case in its proper context, since the case is one of statutory analysis and nothing more.

Section 3490, the so-called "informer's section", has never been repealed, amended, re-enacted or in any way passed upon by Congress since it was derived from the Act of March 2, 1863, 12 Stat. 696, and stated in the Revised Statutes of 1878.

As can readily be seen from an examination of this section, it incorporates by reference the provisions of Section 5438 of the Revised Statutes of 1878, and it has been established beyond question that liability attaches under Section 3490 only if acts prohibited by Section 5438 have been committed. See *United States* ex rel *Marcus* v. *Hess*, 317 U. S. 537 (1942); *United States* ex rel *Brensilber* v. *Bausch & Lomb Optical Co.*, 131 F. 2d 545 (2d Cir. 1942), affirmed

320 U. S. 711 (1943). This being true, respondents must have committed an act prohibited by Section 5438 in order for the United States to recover in this case. For this reason, as respondents have stated previously, this case is concerned primarily if not wholly with the meaning, construction and history of a criminal statute, Section 5438.

Since its original enactment, Section 5438 has been repealed, re-enacted and amended, but these actions have no direct bearing on the present case, because this section stands, for purposes of suit under Section 3490, as it read when incorporated by the latter section in 1878. See *United States* v. *Rohleder*, 157 F. 2d 126 (3d Cir. 1946). As Judge Augustus Hand speaking for the Second Circuit held in *United States* ex rel *Kessler* v. *Mercur Corporation*, 83 F. 2d 178, 180 (2d Cir.), cert. denied, 299 U. S. 576 (1936):

> "While Section 5438 was amended, repealed, and finally since the time when it was referred to in Section 3490 superseded by a broader enactment (18 U.S.C.A. §80), it stands, insofar as Section 3490 is concerned, as it was written when incorporated by reference. It is quite immaterial that the superseding Act alone appears in the United States Code for the Code only embodies a prima facie statement of the statutory law. It is well settled that where a statute incorporates another, and the one incorporated is thereafter amended or repealed, the scope of the incorporating statute remains intact and 'no subsequent legislation has ever been supposed to affect it. . . .'" (Citing cases)

This principle of statutory construction has been recognized by this Court on several occasions. See *Kendall* v *United States*, 12 Pet. (37 U. S.) 524 (1838); In re *Heath*, 141 U. S. 92 (1892). It rests upon a sound principle, for, as this Court stated in In re *Heath*, *supra*, at page 94:

"No other rule would furnish any certainty as to what was the law and would be adopting prospectively, all changes that might be made in the law."

The vitality of this principle was recognized by the Third Circuit in *Olson* v. *Mellon*, 4 F. Supp. 947 (W.D. Pa.), affirmed, 71 F. 2d 1021 (3d Cir. 1933), cert. denied, 293 U. S. 615 (1934), wherein the court specifically held that the scope and effect of the civil section, Section 3490, was not affected by an amendment of the criminal section, Section 5438, since the scope of the civil section could not be altered by a change in the criminal section. See also *United States* ex rel *Boyd* v. *McMurtry*, 5 F. Supp. 515 (W.D. Ky. 1933).

We must, therefore, read Section 5438 into Section 3490 as the former was stated in 1878 when incorporated by the latter, and, for purposes of this suit, we must discern and follow the meaning of Section 5438 as that meaning was intended in 1878. This meaning may be discovered from two sources—first, legislative history and second, judicial opinion.

B.

The Entire Legislative History of Section 5438 Shows Beyond a Doubt That a Government Corporation Was Not Included Within the Scope of the Section in 1878 When It Was Incorporated by Section 3490.

Keeping in mind that no recovery may be had under Section 3490 unless an act prohibited by Section 5438 has been committed, and that Section 5438 must be read and interpreted as incorporated by Section 3490 in 1878, we turn our attention to the meaning of Section 5438 in 1878.

As incorporated, and as applicable to the question here involved, Section 5438 applied criminal sanctions to the following class:

> "Every person who makes or causes to be made, or presents or causes to be presented, . . . *any claim upon or against the Government of the United States, or any department or officer thereof*, knowing such claim to be false, fictitious or fraudulent, . . ." (Emphasis added)

As can readily be seen, sanctions apply to a wrong committed against three possible entities only: (1) the Government of the United States, (2) any department of that Government or (3) any officer of that Government. No mention was made of a government corporation and, as we shall show, a government corporation was not intended to be included.

As pointed out in petitioner's brief, Congress, in enacting Section 5438, evidenced an intent that the section have a broad scope. During and immediately after the Civil War there had been a large number of claims filed against the Government which proved to be false, and this section was intended to be broad so as to reach all ". . . frauds and corruption perpetrated upon the United States and to prevent conspiracies formed for the purpose of defrauding and plundering the Government." 12 Stat. 696, *Cong. Globe*, 37 Cong. 3d Sess., 952-958. The section was purposely made general in order to cover the making of ". . . false and forged claims in any of the thousand modes by which it may be done . . ." *Cong. Globe*, 37 Cong., 3d Sess., 954.

In 1885 one of the first cases considering the scope of these two sections had this to say:

> "The statute is a remedial one. It is intended to protect the Treasury against the hungry and unscrupulous hosts that encompass it on every side and should be construed accordingly." *United States* v. *Griswold*, 24 Fed. 361, affirmed, 30 Fed. 762 (9th Cir. 1885).

It is obvious, therefore, that Section 5438 was intended by Congress to have a rather broad scope; we shall show, however, that this scope did not include a false claim against a government corporation.

In 1908 Section 5438 was amended, and in 1909 it was repealed and superseded by Section 35 of the Criminal Code. 35 Stat. 1015, 1153, 555. None of these changes altered the scope of the original section for purposes of this suit, as readily can be seen by an examination of these changes. And, as we have demonstrated, these changes, in any event, could not affect the scope or meaning of this section as incorporated by Section 3490.

On October 23, 1918, however, a very significant event occurred. Section 5438 (appearing now as Section 35 of the Criminal Code) was amended, 40 Stat. 1015, and the phrase ". . . or any corporation in which the United States of America is a stockholder. . . ." was added to the original three entities against whom the statute made it a crime to claim falsely. Section 5438, after amendment penalized the following persons:

> "Section 35 — Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, . . . any claim upon or against the Government of the United States, or any department or officer thereof, *or any corporation in which the United States of America is a stockholder*, knowing such claim to be false, fictitious, or fraudulent. . . ." (Emphasis added) 40 Stat. 1015. (The italicized words are those added by the amendment.)

This amendment has no direct bearing on Section 3490, since that section incorporates Section 5438 in its 1878 form, and nothing more. It does, however, provide an invaluable, and we think conclusive, indication of the scope of

the words used to describe the three entities described in Section 5438 in 1878.

The question immediately presented is whether this amendment was an extension of the scope of Section 5438 or merely a clarifying declaration of its existing coverage. If, as the respondents contend, it was an extension, obviously a false claim against a government corporation was not prohibited or censured by Section 5438 prior to this amendment, and, for this reason, a recovery under Section 3490 cannot be had for making such a claim, since Section 3490 incorporates only the 1878 meaning of Section 5438.

Examining the language used prior to the amendment petitioner has argued that it is patent that a government corporation was included within the language: ". . . Government of the United States, or any department or officer thereof . . .", especially since Congress evidenced an intent that the section have a broad scope. We have, however, a clear and unequivocal statement of the intent of Congress to the contrary in amending the section.

Representative Gard, from the Committee on the Judiciary, submitted the Committee's report on the amendment to the House of Representatives. The following passage is pertinent to the issue in question:

> "The amendments serve to fully re-enact and reinforce the provisions of Section 35 of the Criminal Code *so that it will include all the offenses heretofore contained therein and an offense against 'any corporation in which the United States of America is a stockholder'* either as to the presentation of a false claim, a falsification of statements or representations, the use of any false bill, receipt, voucher, etc., against the United States, or any department thereof, *or any corporation in which the United States of America is a stockholder*, . . . (Emphasis added) H. R. Rep. No. 668, 65th Cong., 2d Sess. (1918).

After the bill was read, Representative Igoe, in the absence of the chairman of the committee, explained the bill as follows:

> "Mr. Igoe . . . The only amendments to the existing laws are the *extension of the penalty of this act to false and fraudulent claims that are presented against corporations in which the United States is a stockholder*, and also the punishment of the disposal of the property belonging to the Army or Navy and pledging it or selling it or disposing of it wrongfully." (Emphasis added) 56 Cong. Rec. 11, 118 (1918).

After reading the bill in its naked form as it was received from the Senate, Mr. Igoe went on to say:

> "That as I recall it was all there was to this bill as it came from the Senate, and to it was subsequently attached the rest of Section 35 as amended *to extend the law to false and fraudulent claims made against a corporation in which the United States is a stockholder.*" (Emphasis added) 56 Cong. Rec. 11, 119 (1918).

It is apparent, therefore, that Congress in passing the amendment intended to extend the scope of the Act, and that Section 5438 as enacted did not penalize false claims against government corporations, since Congress had not intended to censure such claims in enacting the section in 1878.

The courts uniformly have found this to have been the intent of Congress in this matter. In *United States* v. *Bramblett*, 120 F. Supp. 857, 859 (D. C. Dist. 1954), the District Court, stated:

> "Congress then passed the amendment of October 23, 1918, 40 Stat. 1015, *since unsuccessful attempts had*

> *been made under Section 35 to punish persons committing frauds against some of the corporations created by Congress during World War I in which the Government owned all or part of the stock.* The amended section added, among other things, the words 'any corporation in which the United States of America is a stockholder.'" (Emphasis added)

This Court on appeal, reversed, which reversal does not concern the corporation question raised here, 348 U. S. 503 (1955), and while detailing the history of Sections 3490 and 5438, stated in a footnote:

> "Section 35 was in turn revised in 1918, 40 Stat. 1015. The false claims provision was extended to cover corporations in which the United States held stock; . . ."

Here, this Court merely followed its prior dictum in *Pierce* v. *United States*, 314 U. S. 306 (1941), where it indicated that the 1918 amendment of Section 5438 was made to meet the then new development of government administrative corporations, and was an extension of the scope of this section beyond its scope as incorporated by Section 3490 in 1878.

The conclusive case on this point is *United States* v. *Bowman*, 260 U. S. 94 (1922), in which the Government indicted one Bowman, charging him with having made a false claim against the Emergency Fleet Corporation in violation of Section 5438 as amended (Section 35 of the Criminal Code). In speaking of the 1918 amendment this Court stated as follows at page 101:

> "It is directed generally against whoever presents a false claim against the United States, knowing it to be such, to any officer of the civil, military or naval

service, or to any department thereof, or any corporation in which the United States is a stockholder, or whoever enters a conspiracy to do these things. The section was amended in 1918 to include a corporation in which the United States owns stock. This was evidently intended to protect the Emergency Fleet Corporation, in which the United States was the sole stockholder, from fraud of this character."

It is to be noted that this decision was based upon the fact that the United States was the *sole* stockholder in the Fleet Corporation and no reliance or mention was made of the tenuous distinction urged by petitioner in its brief to the effect that the Fleet Corporation was in some way a "hybrid-entity" partly owned by private individuals (Br. 24-25; 36).

Further, in *United States* v. *Strang*, 254 U. S. 491, 493 (1920), this Court held regarding the Fleet Corporation, that: "Notwithstanding *all* its stock was owned by the United States, it must be regarded as a separate entity." This Court further pointed out that the 1918 amendment of Section 5438 (Section 35, Criminal Code) was the language which brought government corporations within the ambit of Section 5438. *Id.* at 493-494.

Without more, the decisions in these two cases should be a complete answer to the entire argument advanced by petitioner which purports to deal with the "reality" of the situation. This Court recognized at an early date that whether or not all the stock or part of the stock was owned by the United States was not significant, since it held that even if all the stock were owned by the United States the corporation still was not included by the Act until the amendment of 1918.

Recognizing this, Congress has carried forward the corporation provision of Section 5438, as amended, into Sec-

tions 287 and 1001 of Title 18, U. S. C., by using the word "agency" and defining agency in Title 18, U. S. C., Section 6, as including ". . . any corporation in which the United States has a proprietary interest. . . ."

It seems obvious that Congress in 1878 did not include a government corporation within the purview of Section 5438. We have no problem of strict or liberal construction. Congress has expressly indicated that government corporations were not included in 1878. Judicial construction of the most liberal nature cannot make an enlargement which Congress has indicated is unwarranted. As the Court below pointed out, 242 F. 2d 364:

> ". . . the language is not broad enough to cover such claims, however liberal an interpretation be placed upon it."

It seems strange that Congress did not intend that a government corporation be included by Section 5438 in 1878, especially in view of the pronouncements at that time; there is, however, a very clear and logical answer to this apparent anomaly.

C.

Judicial Construction Has Determined That Government Corporations Were Not Included in Section 5438 in 1878 and in Acts Using Similar Phraseology Adopted During That Period.

Considering the language of Section 5438 prior to the amendment and without reference to legislative history of the section, it is apparent why government corporations were not intended to be included, even without the aid of the clear pronouncement of Congress to this effect.

The Supreme Court has decided a case which we submit

is the controlling authority on this question and which presents us with a complete answer. In *Pierce* v. *United States*, 314 U. S. 306 (1941), this Court held that the defendant in the case could not be prosecuted criminally under a statute (Section 32 of the Criminal Code) making it a crime fraudulently to ". . . pretend to be an officer or employee acting under . . . the authority of the *United States, or any department, or any officer of the government thereof* . . . ," since the defendant had not pretended to be such an employee but instead had pretended to be an employee of TVA, a wholly owned government corporation, and an agency and instrumentality of the United States, which was not covered by the statute.

The rationale of the decision is that a government corporation was not one of the three entities included in the Act when it was passed. Justice Reed stated for this Court at pages 310-311:

> "The statute in effect at the time of the commission of the alleged offenses did not speak of pretenses of acting under authority of corporations owned or controlled by the United States. It was passed in 1884 before the United States owned or controlled corporations operating hotels, boat lines or generating plants. The amendments, subsequent to the occasions fixed by the indictment, extended its scope first to the Home Owners Loan Corporation (citing authority), and later to all corporations owned or controlled by the United States, 52 Stat. at L. 82, Chap. 37. These legislative extensions of the scope of the act were in accord with the growing importance of the administrative corporation, but a comparable judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness."

This case, we submit, is on all fours with the present case, not only in principle and language, but in background as well, for Section 32 of the Criminal Code, like Sections 3490 and 5438, grew out of the evils practiced during and after the Civil War. This Court recognized the identical nature of these sections, and in a dictum appearing on page 312 of the opinion states that a legislative extension of Section 5438 (Section 35 of the Criminal Code) was made in 1918 to meet the new development of government corporations.

It is clear now how Congress could state in 1878 that it intended to reach all frauds against the United States and yet have it be necessary in 1918 to extend the scope of Section 5438 in order to reach claims against government corporations. The answer is simple; in 1878 Congress never dreamed of any such entity as a government corporation, and, therefore, its broadest intentions and declarations could not encompass such an entity. Only when this new entity appeared in Government was it possible for Congress to include it.

The petitioner apparently has conceded this point to all intents and purposes, stating as follows on page 23 of its brief: "Concededly, the use of wholly owned government corporations to execute public programs and expend public monies is, for all practical purposes, a contemporary innovation. It is unlikely, therefore, that this method of carrying on the government's business was of specific concern to the Congress either in 1863 or in 1878."

This Court in *Proprietors of the Bridges* v. *Hoboken Land and Improvement Company*, 68 U. S. 116 (1864), established the rule of construction for which respondents are contending here. There, this Court held that: "It does not, therefore, follow that when a word was used in a statute or a contract seventy years since, that it must be held to

include everything to which the same word is applied at the present day. . . . We are, therefore, quite clear that the adoption of that word to express the modern invention does not bring it within the terms of the Act. . . ." *Id.* at 148-149.

In 1878 Congress spoke in broad terms of the "Government of the United States". Today, this term by common usage perhaps might include a government corporation. It did not include such a corporation in 1878 since Congress never conceived of such an entity and could not have intended to include it. The modern usage cannot, therefore, change the scope of the section as adopted and fixed in 1878. This is all the more apparent when it is remembered that Section 5438 is a criminal statute and must not be enlarged by construction.

In *United States* ex rel *Salzman* v. *Salant & Salant, Inc.*, 41 F. Supp. 196 (S.D. N.Y. 1938), the Court specifically considered the question presently before this Court and held that a government corporation (The Red Cross) although an agency of the United States, is not "the Government of the United States, a department or officer thereof", as these words were intended when used in Section 5438 in 1878; therefore, no civil recovery was allowed under Section 3490 for certain false claims made against such a corporation. The Court dismissed the Government's complaint on a motion by defendants for judgment on the pleadings. This case is commended to this Court as a holding on all fours with the instant case and is direct authority for respondents' contention here.

Apparently Judge Knox of the District Court in the Southern District of New York decided another case on the same question and reached the same result. *United States* ex rel *Gilchrist* v. *American Cotton Cooperative Association*. See note, 41 F. Supp. 197. Unfortunately, his opin-

ion in that case is not published. Neither of these cases was ever appealed by the Government.

In *United States* v. *Cohn*, 270 U. S. 339 (1925), this Court held that Section 5438 concerned only claims against the Government based upon the Government's liability to the claimant. In the present case there was no liability on the Government and nothing was submitted to anyone except the Commodity Credit Corporation.

As then Circuit Judge, now Chief Judge, Parker of the Fourth Circuit held in *Lindgren* v. *United States Shipping Board Merchant Fleet Corporation*, 55 F. 2d 117 (4th Cir.), cert. denied, 286 U. S. 542 (1932):

> *"Plaintiff contends, however, that this suit and the former suit are virtually against the same defendant because the United States owns the stock of the Fleet Corporation, and the Fleet Corporation is an agency of the United States. This position cannot be sustained.* The United States is a sovereign power representing in its corporate capacity the people of the country and immune from suit, except as it may give its consent thereto. The Fleet Corporation is a private corporation of the District of Columbia, created under the laws of the United States, with power to sue and be sued in the same manner as other corporations. *Although the United States owns its stock, it is a distinct entity such as other corporations are distinct from their stockholders. A suit against it is not a suit against the United States, and a suit against the United States is not a suit against it."* (Emphasis added)

Obviously, any judgment obtained in such a suit ultimately would be paid by the Government of the United States. This could not affect the case. As a matter of fact and law, a corporation is a separate entity from its stockholders, and this fundamental principle is to be applied to government cor-

porations as well as to other corporations. This principle of law, the legislative history of Sections 3490 and 5438, the decision of this Court in the *Pierce* case, and the decisions of the United States District Court for the Southern District of New York, leave no doubt in respondents' minds as to the true meaning and application of Sections 3490 and 5438.

II.

It Will Be Error for This Court to Give a Liberal Construction to Section 5438 So As To Include a Government Corporation.

Petitioner is urging upon this Court the very error committed by the District Court in this case and by the Eighth Circuit in the case of *United States* v. *Rainwater*, 244 F. 2d 27 (8th Cir. 1957), and that is, that this Court should give a liberal interpretation to the provisions of Section 5438 which are incorporated by Section 3490. The petitioner calls it a "functional" interpretation dictated by the *Hess* case (Br. 21). As the Court stated in the *Rainwater* case, 244 F. 2d 32: "We are not dealing with the criminal aspects of a statute requiring 'utmost strictness' in construction." This Court is most certainly dealing with the scope of a criminal statute. Nothing makes this more certain than the case of *United States* ex rel *Marcus* v. *Hess*, 317 U. S. 537 (1942), the very case relied upon by petitioner, in which this Court in speaking of the construction to be given to Sections 3490 and 5438 stated at page 542 of its opinion:

> *"True, § 5438 is criminal and for that reason in interpreting so much of its language as it shares in common with § 3490 we must give it careful scrutiny lest those be brought within its reach who are not clearly included."* (Emphasis added)

Respondents think it uncontroverted that no construction of Section 3490 can be made except by a direct construction of the criminal section, Section 5438. True, Section 3490 provides for a civil recovery, but it incorporates and depends upon the provisions of Section 5438 which section is, and always has been, criminal. This entire case concerns the scope and meaning of the language used in Section 5438, the criminal section. Since this language details a crime, it must be strictly construed if it is to be construed at all. It is apparent that the scope of Section 5438 cannot be broadened for purposes of suit under Section 3490 without broadening the meaning of Section 5438 for criminal prosecution also. This Court fully recognized this in the *Hess* case, at page 542 of the opinion:

> "This 'qui tam policy' (allowing informers to institute civil suit under Section 3490) cannot be used to detract from the meaning of the language in the criminal section *and we cannot say that the same substantive language has one meaning if criminal prosecutions are brought by public officials and quite a different meaning where the same language is invoked* (civilly) *by an informer.*" (Emphasis added)

The two sections involved here are interrelated. If we restrict Section 5438 in a criminal suit it must bear the same meaning in a civil suit. The same principle applies to any attempted extension of Section 5438's meaning.

Far from dictating a "functional" interpretation the *Hess* case makes it abundantly clear that the words of Section 5438 must be construed strictly when incorporated into Section 3490.

As the Fifth Circuit pointed out in *United States* v. *Cochran*, 235 F. 2d 131, 133 (5th Cir. 1956), cert. denied, 352 U. S. 941 (1957), in affirming the lower court's deci-

sion that no "claim" had been made against the Government within the meaning of the False Claims Act:

> ". . . the United States, in its brief, under the heading, 'A. The civil remedy provided by the False Claims Act must be liberally construed', is here stressing 'the need for a functional interpretation of the statute' and citing in support *United States* ex rel *Marcus v. Hess*, 317 U. S. 537, 63 S. Ct. 379, 87 L. Ed. 443. While not making its meaning completely clear, it seems to be urging upon us: that Section 231 must be viewed, not as ordinary penalty statutes are viewed; as confined in scope and operation to and by the language used, but as a sort of catch all statute announcing and containing a general declaration of principle against fraud and overreaching; that proof that the person proceeded against under it had done any specific thing denounced as an offense is not required, but only proof that the defendant has acted badly toward the United States; and that, under such proof, he must, and may be, subjected, to the penalties the statute provides, not for having violated its terms but for transgressing its spirit."

The Fifth Circuit refused to follow such an interpretation of the Act and held that an offense defined by the Act must be committed before penalties will attach and that the Act is not to be given a sweeping, catch-all interpretation, but, following the *Hess* case, must be interpreted as to its true meaning in the light of its legislative history.

Respondents are not asking that Section 5438 as incorporated by Section 3490 be construed with any more strictness than would a normal criminal statute but they are pointing out that it should be construed with at least that much strictness, as this Court recognized in the *Hess* case.

In any event, as respondents have pointed out before there is nothing to construe, since the meaning of the statute, at

least in this particular, has been made abundantly clear Congress as well as by the courts.

III.

The Interpretive Approach to Sections 3490 and 54 Urged by Petitioner Is Erroneous and Has Been Refut by This Court.

At no point in this case has petitioner ever contended th Section 5438 as adopted in 1878 is not the controlling statu involved. Indeed, it is precluded from doing so by the me fact that this is the statute under which this suit was ins tuted (R. 55). Yet petitioner is now, as it must, urgi upon this Court a consideration of the "substantive rea ties" and the adoption of a "functional interpretation" Section 5438 (Br. 21). Stripped of verbiage and fan phrases, petitioner is urging quite simply that this Cou ignore the plain meaning of the section and is requesting judicial amendment of the False Claims Act which will effect nullify the amendment to the Act made in 1918. pointed out before, the only "substantive realities" prese here are that the False Claims Act did not encompass government corporation until 1918 and that this suit is co trolled by the False Claims Act as it read in 1878, and t only "functional interpretation" of the Act permitted und the *Hess* case is that amount of interpretation allowed f any criminal statute; *i.e.*, it must not be extended by i terpretation.

Respondents feel it is obvious that this Court is in r way concerned with the theoretical or practical distin tions between a government corporation and the Gover ment of the United States urged by petitioner as if the words were being discussed in the light of modern da

developments. As pointed out before, this Court must discern and follow the 1878 meaning of Section 5438.

In a rather exhaustive article appearing in 7 *The Federal Bar Journal* 389 (1946), Mr. Claude T. Coffman who was at the time attorney for the Commodity Credit Corporation Division of the Solicitor's Office, Department of Agriculture, stated at page 412 of his article entitled *Legal Status of Government Corporations:*

> "When a federal statute refers to the 'United States', or the 'United States Government', or 'The Departments of the Government of the United States', is a government corporation also included? . . . An analysis of the cases in this field indicates that the key to issues of this type is to be found more in the legislative background of the particular statute being construed than in any inherent nature of government corporations."

This point is self-evident to respondents. This Court in not dealing with the words in any abstract sense but only as an organic part of a statute. Petitioner at no point in its brief has related its argument to the history and development of the statute in question. Respondents cannot feel that this Court will make the impact of Section 5438, a criminal statute, depend upon the peculiarities of incorporation of the various government corporations so that the section may apply to some and not to others. This is not the definiteness that is required of all criminal statutes.

In any event, petitioner's entire argument that a different result is obtained by looking solely at the present day structure of Commodity Credit Corporation and ignoring the structure of the False Claims Act is answered and controlled by a prior decision of this Court.

In the case of *United States* v. *Walter*, 263 U. S. 15 (1923), certain defendants were indicted under Section

5438, as amended in 1918 (Section 35, Criminal Code), for conspiring to present false or fraudulent claims against the United States Emergency Fleet Corporation. The Government should have had no trouble, since Section 5438 had by then been amended to include false claims against ". . . any corporation in which the United States of America is a stockholder." The District Court, however, sustained a demurrer to the indictment on the ground that the 1918 amendment must be read as extending Section 5438 to cover false claims against *any* corporation in which the United States owned stock regardless of the size of this stock ownership and, so construed, went beyond the power of Congress. See 291 Fed. 622.

On appeal, the Supreme Court in speaking of the 1918 amendment through Mr. Justice Holmes discussed the phraseology of the 1918 amendment and concluded that such phraseology must be limited, holding at page 18 of the opinion:

> *"We are of the opinion that the Act of 1918 should be construed to refer only to corporations like the Fleet Corporation, that are instrumentalities of the government, and in which, for that reason, it owns stock."* (Emphasis added)

We now have a complete answer to the argument put forward by the petitioner. Not only did Section 5438 prior to its amendment in 1918 not cover corporations such as the Commodity Credit Corporation but the amendment itself covered *only* such corporations, since if the amendment were any broader it would have been unconstitutional. It is clear, therefore, that neither the chartering of the Commodity Credit Corporation nor the adoption of the Government Corporation Control Act served to thrust the Commodity

Credit Corporation into the unamended provisions of Section 5438 by making the corporation an instrumentality of the Government. Rather, these actions, if anything, merely brought the corporation within the ambit of the 1918 amendment to the statute. Respondent has clearly demonstrated that the 1918 amendment has no direct bearing here.

As pointed out previously, the cases dealing with the Emergency Fleet Corporation dealt with it as a wholly-owned government corporation and relied not at all upon any of the tenuous distinctions alluded to in the brief filed by the petitioner. In effect, petitioner has asked this Court to sweep aside the corporate entity and in a search for the "realities" of the situation stretch the Act to cover the stockholder, the United States.

Although respondents contend that the amount of control exercised by the Government over the Commodity Credit Corporation is immaterial, since ownership of the entire stock of the corporation carries with it absolute control and such ownership has been held not to bring a corporation within the purview of Section 5438 prior to the 1918 amendment, it should be pointed out that this potential control is not as fully exercised as petitioner would lead the Court to believe.

Indeed, in enacting the Government Corporation Control Act, 31 U. S. C. §841, *et seq.*, Congress was careful to make clear that it did not desire to exercise more control over the corporation than was necessary to preserve the Government's rights as a stockholder. Far from making the corporation a mere legal shell, Congress desired to leave it as autonomous as possible, consonant with good government. In this connection, the Senate Committee, recommending the Act stated at page 7 of Sen. Rep. 694, 79th Cong., 1st Sess. (1945):

> "The corporate form of organization is a useful device for carrying out a variety of government services and programs, of a continuing as well as an emergency character. It is generally agreed that the corporate form loses much of its peculiar value without reasonable autonomy and flexibility in its day-to-day decisions and operations. The budget and financial controls imposed upon the government corporations should not deprive them of this freedom and flexibility in carrying out authorized programs to a greater extent than is necessary to conform their operations to the program of the government and the will of Congress."

In accord with this avowed purpose, while the Government Corporation Control Act provides for an audit of the financial affairs of all government corporations, this audit is not what is known as a "governmental" audit, which is generally made to determine whether the expenditures of agencies or departments of the Government are for valid obligations of the Government, but is rather what has been called a "commercial" audit, being the type used in the business world solely to close the books of any normal corporation. See Sen. Rep. 694, 79th Cong., 1st Sess. (1945), pages 8-9.

The audit is not for purposes of verifying the propriety or advisability of entering into the obligations incurred by the corporation but is merely for the purpose of obtaining a verified account of the expenditures of the corporation during the audited period. In this connection, it is important to note that in 31 U. S. C. A. §852, a portion of the Government Corporation Control Act, Congress provided that in certain circumstances the Government might treat a government corporation as if it were any other agency of the Government for accounting purposes. The section immediately points out, however, that: "The corporate entity shall not be affected by this section." So, even at this

point, the Congress was quick to preserve the status of the corporation as a separate legal entity from the Government of the United States. Freedom from the political and administrative entanglements found in a government department was and is the chief reason for the employment of government corporations. This independence is vital, and such corporations are not mere bookkeeping devices. See Lilienthal *The Conduct of Business Enterprises by the Federal Government,* 54 Harv. L. Rev. 545 (1941).

Petitioner has cited the Court to its decision in *United States* ex rel *Marcus* v. *Hess,* 317 U. S. 537 (1942), as the controlling decision for purposes of this case. Respondents think it is obvious that this case is not controlling.

There, this Court examined the entire record and determined that as a matter of fact the claims had been made against the Government of the United States although an intermediary State agency was involved. In this case, the trial court has made a finding of fact that the claims were submitted to the Commodity Credit Corporation a wholly-owned government corporation (R. 73). The trial court then concluded, as a matter of law, that such a claim was one against the Government of the United States within the meaning of Section 3490 of the Revised Statutes of 1878. At no point in this case has the Commodity Credit Corporation been treated as a mere intermediary. The Commodity Credit Corporation is not an intermediary which receives claims and transmits them for reliance and payment by the United States as was done in the *Hess* case. The claims are submitted to the corporation and it either rejects them or pays them and no claims are in turn submitted by the corporation to the Government.

More important still, the *Hess* case establishes a rule of construction to be followed in cases where the scope of the False Claims Act is not clear. In the present case, Congress

and the courts have made the scope of the act manifest related to government corporations. Such corporations we not intended to be included and were not included by Co gress in 1878. Whether this Court today might consider t funds of the corporation the funds of the United States not should not be controlling, since such a corporate entit regardless of whose funds it uses, was not included with the Act upon its adoption. As stated in an article reviewir the decisions of the Eighth Circuit in the *Rainwater* cas *supra*, and the lower court in this case, appearing in 58 Co L. Rev. 118 (1958) at 121:

> "The argument advanced in the *McNinch* case, whic the instant Court (the 8th Circuit in *Rainwater*) faile to answer, seems legally irrefutable. Where the crim nal statute was subsequently amended to extend it prohibitions to false claims against government co porations, it is probable that Congress thought that th scope of the original enactment which incorporated th criminal act before its amendment did not include suc a prohibition. Thus it seems that before the Fals Claims Act can properly apply to the Commodity Cred Corporation, Congress must so provide."

Other agencies or entities may be included within the Ac since Government funds may or may not be expended, bu regardless of whether this Court deems these funds to b those of the Government or not, it is clear that the Com modity Credit Corporation, or any government corporatio is, in effect, specifically excluded from the coverage of th False Claims Act as it presently stands.

The two prime fundamental legal principles before th Court in this case, respondents submit, are that a crimina statute must not be extended by construction and that crime must be defined with appropriate definiteness. It clear in respondents' minds that violence will be done to bot

these concepts if the False Claims Act is stretched to include the claims submitted by respondents.

One word in closing about the concern of the Government over its supposed loss of funds if suit is not permitted under this particular Act. It is perfectly well settled, and has never been disputed, that the Government can recover damages in these cases in a simple common-law action without the benefit of any particular statute. This will make the Government whole. Also, ample criminal provisions exist for the punishment of any persons making such claims against the Commodity Credit Corporation so that future claims of this nature, if of an undesirable character, can be prevented. See 15 U. S. C. §714m(a-d). In any event, in the present case the trial court concluded as a matter of law that the Government had suffered no legally recoverable damages (R. 74). For this reason, the Government's case boils down to a suit for numerous penalties and the Government is whole regardless of the result of this appeal.

CONCLUSION

For the reasons set forth above, respondents respectfully submit that the decision of the United States Court of Appeals for the Fourth Circuit in the *Cato* case should be affirmed.

Respectfully submitted,

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March 1958

Supreme Court of the United States

OCTOBER TERM, 1957

No. 146

UNITED STATES OF AMERICA, PETITIONER,

versus

HOWARD A. McNINCH, d/b/a THE HOME COMFORT CO., ROSALIE McNINCH AND GARIS P. ZEIGLER; FREDERICK L. TOEPLEMAN; AND CATO BROS., INC., WILFRED R. CATO, WILLIAM R. CATO, AND MAGIE L. DUNN (NEE: MAGIE L. STONE).

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR HOWARD A. McNINCH, ROSALIE McNINCH AND GARIS P. ZEIGLER

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The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR HOWARD A. McNINCH, ROSALIE McNINCH AND GARIS P. ZEIGLER

QUESTION PRESENTED

Whether appellees, Howard A. McNinch, Rosalie McNinch and Garis P. Zeigler, made, or caused to be made, or presented, or caused to be presented, for payment or approval, to the United States, or any department or officer thereof, any claim upon or against the Government of the United States within the contemplation, intent or purview of the Civil False Claims Statute.

STATUTES INVOLVED

The False Claims Act is composed of Sections 3490 and 5438 of the Revised Statutes of 1878. Section 3490 is a civil statute whereas Section 5438 is a criminal statute. Section 3490 (the Civil False Claims Statute), has never been amended although the criminal statute (R. S. 5438), has been amended.

The language of the Civil False Claims Act is to be found in Section 3490, Revised Statutes of 1878, and is as follows:

> "Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the services of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title 'Crimes', shall forfeit and pay to the United States the sum of Two Thousand Dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

Prior to the amendment of R. S. 5438 (the criminal statute), the pertinent portion of that section, incorporated by reference in R. S. 3490, was as follows:

> "Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval services of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent

or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, * * * shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars."

STATEMENT OF THE CASE

The relevant facts, which are not disputed, can be summarized as follows:

The Appellee, Howard A. McNinch,* was President, the Appellee, Mrs. Rosalie L. McNinch, was Secretary, and the Appellee, Garis P. Zeigler, was salesman of an unincorporated home construction business located in Columbia, South Carolina.

From November 6, 1951 to January 10, 1953, Appellees presented to The South Carolina National Bank, a FHA approved lending institution, eleven false FHA credit loan applications in connection with home improvement loans. The loans were sought on behalf of home-owner customers for the purpose of financing such improvements, each application was also accompanied by a fictitious credit report. Both the applications and reports misrepresented the financial eligibility of the customer for the insured loan.

The South Carolina National Bank, a private lending institution, made the loans as requested and the same were insured routinely by the FHA as a property improvement loan, insurable under Title 1 of the Federal Housing Act.

The FHA acknowledged the loans for insurance and billed the bank for the premiums required by the act.

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* The Appellee, Howard A. McNinch, died in September, 1955, and since that time the Appellee, Rosalie L. McNinch, has been duly appointed as the legal representative of his estate.

Prior to this proceeding Appellees, Howard A. McNinch and Garis P. Zeigler, plead guilty of violating 18 U. S. C. 1010, which prohibits making false statements for the purpose of obtaining FHA insured loans. The Appellee, Howard A. McNinch, before this ateion or the criminal action were commenced had purchased all the outstanding FHA insured loans and mortgages and assigned them to the bank for collection, and as a result thereof no claims can ever be made against the FHA under their insurance contract.

SUMMARY OF ARGUMENT

The Government contends that the appellees are liable in the amount of two thousand ($2,000.00) dollars for each of the eleven FHA Credit Loan Applications by reason of the provisions of the Civil False Claims Act.

Thus, the sole question for decision is whether what the appellees did constituted a violation of this false claims statute.

The United States in an elaborate and ingenious argument contends that the False Claims Act must be liberally construed so as to provide protection against those who would "cheat the United States." In substance, the Government's theory is that the appellees, in furnishing to the lending bank false credit information with reference to the borrower thereby made a claim upon the Government for an extension of its credit in support of the loan applied for, as a result of which the Government was cheated and this was in effect a false claim in which the United States was fraudulently induced to part with money or property, within the meaning of the Civil False Claims Statute.

Appellees contend (1) that the appellees did not present a claim against the Government of the United States within the meaning of the Civil False Claims Statute, and (2) that a false claim against the Federal Housing Admin-

istration is not a false claim against the Government of the United States within the meaning of Section 5438 of the Revised Statutes of 1878.

ARGUMENT

I

The Acts prohibited by the False Claims Act must be given careful scrutiny unless those be brought within its terms who are not clearly included.

The Government here, as it did in *United States v. Cochran*, 235 Fed. (2d) 131, Certiorari denied, 352 U. S. 941, and *United States v. Tieger*, 234 Fed. (2d) 589, Certiorari denied, 352 U. S. 941, stresses "the need for a functional interpretation" of the False Claims Act, so as to provide protection against those who would "cheat the United States", and cites *United States ex rel. Marcus v. Hess*, 317 U. S. 537, 87 L. Ed. 443, in support thereof.

Implicit throughout the Government's argument is the thesis that the False Claims Act should be given a liberal and expansive interpretation.

The petitioner severely criticizes the "penal" construction philosophy which finds expression in the majority opinion in the *Cochran case, supra.* (235 Fed. (2d), at page 133.) As we have already pointed out the Civil False Claims Statute incorporates by reference the provisions of the original Criminal False Claims Statute. (R. S. 5438.) As is clearly indicated by the decision in the *Hess case* this Court determined that which constituted a violation of the criminal statute also constituted a violation of the civil statute. This being so we submit that in construing the statute in question the Court is certainly dealing with the scope of a criminal statute. In the *Hess case*, so heavily relied upon by petitioner, this Court, in speaking of the construction to be given to Sections 3490 and 5438, said:

"* * * And we cannot say that the same substantive language has one meaning if criminal prosecutions are brought by public officials and quite a different meaning where the same language is invoked by an informer." (317 U. S. at page 542.)

And also:

"Sound rules of statutory interpretation exist to discover and not to direct the Congressional will. True, Sec. 5438 is criminal and for that reason in interpreting so much of its language as it shares in common with Sec. 3490 we must give it careful scrutiny lest those be brought within its reach who are not clearly included; but after such scrutiny we must give it the fair meaning of its intendment." 317 U. S., at page 542.

It is thus apparent that the Court in that case held that the particular facts therein involved brought the subject matter within the purview of both the criminal and the Civil False Claims Statutes, saying that Act should be given "the fair meaning of its intendment", which, incidentally, was "to provide protection against those who would cheat the United States." This language was obviously used with reference to a factual situation which clearly fell within the terms of the False Claims Statute and this Court did not mean to say, as the Government contends, that the False Claims Statute was intended to cover every situation where someone might intend to cheat the United States even though what that person did was not clearly included within the reach of the False Claims Statute.

The Government's argument that the False Claims Act must be construed to provide protection against all those who would "cheat the United States, "based upon general and isolated quotations from the *Hess case*, either overlooks or disregards the oft-repeated admonition of Chief Justice Marshall "that general expressions, in every opinion, are to be taken in connection with the case in which

these expressions are used," and if they go "beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Cohen v. Virginia*, 6 heat 264, 399, 19 U. S. 264.

The Government's reliance upon the decision of the Supreme Court in *Rex Trailer Company, Inc., v. United States*, 350 U. S. 148, like its reliance upon the *Hess case*, is based on certain language in the opinion where the Court was dealing with an entirely different factual situation.

Apparently the Appellants in the *Rex Trailer case* were prosecuted and convicted of a violation of Title 18, Sec. 1001 U. S. C., which is dissimilar from the False Claims Act and broader in scope, in that it does not require the filing of a false claim, but covers the making of any false, claim, but covers the making of any false, fictitious or fraudulent statement or representation.

The statement in Mr. Justice Clark's opinion in the *Rex Trailer case* to the effect that the *Hess case* "involved a provision of the False Claims Act * * * essentially the equivalent of Section 26(b)(1) (of the Surplus Property Act of 1944, 50 U. S. C. A. Sec. 1635) * * *", obviously refers to the civil remedies provisions of the two acts, which are essentially equivalent. We say it is obvious because the Court was considering the contention that the application or allowance of the civil remedies provisions would constitute double jeopardy with reference to a person who had been previously indicted and convicted for defrauding the Government in connection with the same transaction.

As appears from the decision of the Seventh Circuit in *United States v. Rex Trailer Company, Inc.*, 218 F. (2d) 880, 882, Section 26(b) of the Surplus Property Act of 1944, now Title 40, Sec. 489, U. S. C., which grants to the

United States several remedies similar to those provided by the False Claims Act, was enacted by Congress shortly after the decision of the Supreme Court in *United States ex rel. Marcus v. Hess, supra.*

The Respondents Howard A. McNinch and Garis P. Zeigler were indicted and prosecuted under the applicable statute, Section 1010, Title 18, U. S. C., for in making false statements in connection with securing loans from the lending bank.

The provisions of Section 1010, Title 18, U. S. C. are as follows:

> "Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such Administration, makes, passes, utters, or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited, or willfully over values any security, asset, or income, shall be fined not more than $5,000.00 or imprisoned not more than two years, or both."

It would seem clear that Congress deemed the Criminal False Claims Statute to be inapplicable to persons who make false or fraudulent statements in connection with procuring an F. H. A. loan, for otherwise there would have been no reason for the adoption of Section 1010.

It is obvious that Section 1010 is much broader in scope in that it includes persons who do not come within the

False Claims Act. Section 1010 does not deal with persons who make claims against the F. H. A., but is designed to punish those who make false statements in connection with any application for an F. H. A. loan. In other words, it is clearly applicable to what these appellees did in this case whereas the False Claims Statute is not.

The fallacy in the Government's position is pointed out in the majority opinion of the Fifth Circuit in the *Cochran case*, 235 Fed. (2d), at page 134, where it is said:

> "It goes without saying that the acts of the defendant were criminal and that he was correctly prosecuted and convicted under the applicable statute, Sec. 1010, Title 18, U. S. C., for making false statements in connection with procuring the loan from the bank. It is quite another thing, however, to say that, because he was so guilty, he was subject to the penalties provided in Section 231. Section 1010 does not so provide. It specifically denounces as an offense the making 'for the purpose of obtaining any loan or advance of credit from any * * * or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance * * * any statement knowing the same to be false', and under this statute, which plainly dealt with and plainly denounced his actions as an offense, defendant was correctly prosecuted and convicted.
>
> "What the government is in effect doing here is reading into Sec. 231, the language of Sec. 1010, or, putting it differently, reading Sec. 231 as though it contained the same or similar language to Sec. 1010, whereas, as plainly appears in note 1, *supra*, nowhere in it is there any language having such purport or effect. Every word and line of this statute breathes the purpose to deal, it has the effect of dealing, only with the acts of persons falsely claiming money or property in the circumstances and with the effect dealt with in the statute. The statute does not deal with or denounce fraud in general. It cannot be read as doing so. In the *Marcus case*, on which the government so

strongly relies, the court thus correctly states the rule controlling here:

"'Sound rules of statutory interpretation exist to discover and not to direct the congressional will. True Sec. 5438 is criminal and for that reason in interpreting so much of its language as it shares in common with Sec. 3490 we must give it careful scrutiny lest those be brought within its reach who are not clearly included; but after such scrutiny we must give it the fair meaning of its intendment.'"

II

No claim, within the contemplation, intent and/or purview of the False Claims Statute, was made, caused to be made, presented, or caused to be presented by these Appellees.

As stated in the majority opinion of the Third Circuit in *United States v. Martin Tjeger*, 234 Fed. (2d) 589, it would seem apparent that the False Claims Act can be applied to this case only if the Government's contractual undertaking to repay a private bank loan if the borrower should default, itself constituted the "payment or approval" of a "claim against * * * United States."

We believe the Court in that case has demonstrated that what the Appellees did in this case did not constitute a violation of the False Claims Act. It was there said:

"But whatever combination of words may seem most favorable to the government, the statute can apply to this case only if the government's contractual undertaking to repay a private bank loan if the borrower should default, itself constituted the 'payment or approval' of a claim against the * * * United States.' We think this is a fair and accurate statement of the government's legal problem. At the same time it reveals the inherent difficulty and weakness of the position the government has to take. For the conception of a claim against the government normally connotes a

demand for money or for some transfer of public property. Believing that connotation applies here, we shall affirm the judgment below simply on the ground that when Congress legislated against fraud in connection with the 'payment or approval' of 'any claim upon or against the * * * United States' it did not cover fraud in inducing the United States to make a guarantor's promise, performance of which was conditioned upon an event which never occurred. True, the contract Tieger induced might have led to what would undoubtedly be considered a claim against the United States, but it never did. And certainly, there is no indication that Tieger intended or even anticipated any default by the borrower and consequent claim on the guarantor.

"Actually, the alleged claim against the United States here is no more than the privilege of the lending bank, in such a case as the loan application falsely represented this to be, to negotiate a unilateral contract under which the bank pays a modest consideration and receives in return the promise of the United States to make good if a borrower shall default. It is possible to view this commercially advantageous privilege of exchanging a little money for such an aleatory promise as a claim. But this privilege of contracting certainly is not a claim in normal business or legal usage and terminology. For familiar example, a policy of life insurance often accords the owner during the life of the insured a privilege of converting the policy into a new different contract. It seems as strange to describe the exercise of this privilege of contracting as a claim, as it is normal so to denominate an application for the sum payable upon the death of the insured.

"Both the legislative history and certain language of the False Claims Act point to the soundness of the construction which thus restricts 'claim * * * against the * * * United States' to this convential meaning of demand for money or property. But resort to these is unnecessary because the Supreme Court has so clearly stated its view of the matter.

"*United States v. Cohn*, 1926, 270 U. S. 339, 46 S. Ct. 251, 70 L. Ed. 616, was a criminal prosecution in which one of the charges was the violation of the very provision now in suit, which then was effectuated and enforcible by a criminal as well as a civil sanction. Referring to this provision the court explicitly considered whether the conduct of the defendant amounted to 'obtaining the approval of a "claim upon or against" the Government, within the meaning of the statute (False Claims Act).' It then construed the decisive language of the statute, saying: 'While the word "claim" may sometimes be used in the broad judicial sense of "a demand of some matter as of right, made by one person upon another, to do or to forebear to do some act or thing as a matter of duty," *Prigg v. Commonwealth of Pennsylvania*, 16 Pet. 539, 615 (10 L. Ed. 1060), it is clear in the light of the entire context, that in the present statute, the provision relating to the payment or approval of a 'claim upon or against' the Government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the Government, based upon the Government's own liability to the claimant.' 270 U. S. at 345-346, 56 S. Ct. at page 252.

"Seeking to minimize the force of this construction the government calls it 'dictum', meaning, apparently, that this construction was more restrictive than the exigencies of the case required. But, to an inferior federal court, such a plain statement of a statute's meaning, adopted by the Supreme Court as the basis of its decision is much more than 'dictum', however apparent it may seem to analysts that the court could have gone on a narrower ground, had it chosen to do so.

"The district court correctly concluded that the statute deals only with false claims upon the government for money or property and that no such claim is revealed in the counts which have been dismissed."

III

A false claim against Federal Housing Administration, an agency of the Government, is not a false claim against the Government of the United States within the meaning of Section 5438 of the Revised Statutes of 1878, and hence no penalties can be exacted under Section 3490 of the Revised Statutes of 1878.

This phase of the case is fully covered in the brief filed herein on behalf of the appellees *Cato Brothers, et al.*, and accordingly the arguments set forth in that brief are incorporated herein by reference.

The only difference between the status of Commodity Credit Corporation and that of the Federal Housing Administration, is that the former is wholly owned government corporation, acting as a governmental agency, whereas the latter is an unincorporated governmental agency having in reality essentially the same status as that of Commodity Credit Corporation and other federally owned corporations. The Commissioner of F. H. A. in carrying out his statutory duties is "authorized, in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal." (12 U. S. C. 702.) F. H. A. has been made subject to the auditing and budgetary provisions of the Government Corporation Control Act. (31 U. S. C. 841 *et seq.*). Originally the funds for the operation of FHA were provided by the Government, but since July 1, 1940 the FHA has been self supporting and has paid all expenses out of earnings. From time to time it issues a report as to its financial status, just like any of the other Government corporations. On page 3 of the March 1, 1958 Report of the Federal Housing Administration the following appears:

> "Note: Since July 1, 1940, the FHA has been self-supporting and has paid all expenses out of earnings. In the early years of operation, the Treasury Department advanced funds totaling $65,497,433.00 to pay ex-

penses and to establish certain of the Insurance Funds. In the fiscal year 1954 all of the funds advanced were repaid to the U. S. Treasury together with interest thereon in the amount of $20,385,529.00."

CONCLUSION

For the foregoing reasons these respondents respectfully submit that the decision of the United States Court of Appeals for the Fourth Circuit in the *McNinch case* should be affirmed.

Respectfully submitted,

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